Published by U. of Denver, Fall 2010

CHANGING CHANGES; A ROAD MAP FOR MONTANA'S WATER MANAGEMENT

LAURA ZIEMER,[*] STAN BRADSHAW,[+] AND MEG CASEY[**]

In the twenty-first century in the West, there is little new water. Often, the only way new uses of water can be accommodated is by changing existing uses. Every Western state provides a process by which existing water rights can be changed. Those processes intend to allow changes to water rights without injuring other water users. Montana has struggled to find a workable process that meets that criteria of fairness. This article examines Montana's history of water right changes, both under the common law and under the 1973 Water Use Act. Prior to the Water Use Act, changes could be made without any prior review. After 1973, any proposed change in a water right must undergo review by the Montana Department of Natural Resources and Conservation (DNRC). Since 1973, Montana's review process has undergone repeated judicial scrutiny and legislative revision to resolve conflicts surrounding DNRC's review of proposed changes. This article examines that recent history; compares the Montana process to similar processes in Washington and Colorado; and concludes by offering recommendations to improve Montana's change process.

I. INTRODUCTION 49
II. MONTANA RECOGNIZES WATER AS A FINITE RESOURCE. 49
A. Closing the Hydrologic Loop: *Trout Unlimited v. Montana DNRC* and House Bill 831. 50
B. Changes to Instream Flow: An Incremental Response to Drought 52
III. A BRIEF HISTORY OF MONTANA'S CHANGE-IN-APPROPRIATION LAW. 53
A. Burden of Proof Prior to July 1, 1973. 54
B. The 1973 Water Use Act—A Sea Change in Montana Water Law. 55

---

[*] Laura Ziemer initiated Trout Unlimited's (TU's) water efforts by establishing the Montana Water Project office a decade ago, in 1998. In Montana, Mrs. Ziemer has expanded Trout Unlimited's water leasing program through legislative improvements to the program and working with ranchers to restore streamflows on their property by converting irrigation water rights to instream flow rights. She is a 1990 graduate of the University of Michigan, graduating cum laude from the Law School while earning a Master's Degree in Resource Ecology with honors from the School of Natural Resources. She lives with her husband and two daughters (ages 6 and 10) in Bozeman, Montana.

[+] Stan Bradshaw Counsel for Trout Unlimited's Montana Water Project. JD 1975, University of Montana.

[**] Meg Casey, J.D. and Master of Environmental Law and Policy candidate 2011, Vermont Law School; B.A. 2004, St. Olaf College. Meg contributed to this article as a Summer Associate for Trout Unlimited's Montana Water Project. Upon graduation, she looks forward to returning to work in Montana water law and play on Montana rivers.

Published by U. of Denver, Fall 2010

C. Correct-and-Complete, Burden of Proof, and the Shifting Sands of Agency Discretion. 57
IV. THE MONTANA LEGISLATURE'S RESPONSE TO AGENCY CONTROVERSY.......... 64
A. House Bill 720— A 2003 Response to DNRC Review Issues. 64
B. Town of Manhattan— Good Intentions Foiled by Process.......... 65
C. *Bostwick v. DNRC*— Down the Rabbit Hole One More Time. 68
D. *Hohenlohe v. Montana DNRC*— The Shifting Sands of Agency Interpretation. 69
E. Montana's Change of Water Right Process under House Bill 40. 75
F. Review of Changes of Appropriation in a Post-House-Bill-40 World.......... 76
V. WASHINGTON'S CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS.......... 78
A. Summary of Washington Statutory Structure. 78
B. The Applicant's Burden in Washington State. 80
C. Washington State's Change of Water Right Application Statistics. 81
D. Internal Agency Guidance on Process Implementation. 82
VI. COLORADO CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS 83
A. Colorado's Water Court System. 84
B. The Colorado Applicant's Burden. 86
C. Colorado Internal Guidance. 87
D. Timelines in Colorado's Change of Water Right Process. . 87
VII. RECOMMENDATIONS FOR MONTANA'S CHANGE PROCESS. 88
A. Recommendation One: A Water Resources Advisory Committee. 88
B. Recommendation Two: Greater Professional Training for DNRC Staff. 89
C. Recommendation Three: Public Rulemaking in Accordance with the Montana APA. 90
D. Recommendation Four: Develop a technical educational program directed at attorneys, consultants, and DNRC's professional staff. 91
E. Recommendation Five: Develop a DNRC web-library of specific accepted methodologies, references, and documentation. 91
F. Recommendation Six: Initiate rule-making to close the deadline loophole between "deficiency letter response" and "correct and complete." 92
VIII. Conclusion 92

Published by U. of Denver, Fall 2010

I. INTRODUCTION

The hallmark of twenty-first century water management is the transfer of water from one use to another. In a time of growing water demand and increasing water scarcity, transfers are one of the only feasible ways to meet the needs of new uses without devaluing existing senior water rights.

While Montana is not the driest of western states, it has its own chapter in the West's story of water conflicts. But as Montana has moved into the twenty-first century, it has also recognized the fundamental limitation of water as a finite resource in ways that some other western states have not.

This recognition of limited water supplies has focused a spotlight on changes in Montana's existing water rights.[1] The concept of changing the purpose, place of use, and point of diversion of existing water rights has long been an integral part of Montana's Water law.[2] Yet the increasing water demand to provide for residential and commercial growth, alternative sources of energy production, and for a variety of newly-recognized aquatic conservation uses, has elevated the importance of water transfers from one use to another as a means to meet that demand. The heightened importance of changes in Montana's water allocation decisions poses challenges for both applicants and the agency reviewing those changes—the Montana Department of Natural Resources and Conservation (DNRC).[3]

Section II of this article examines the modern challenges to water management in Montana, and the role of changes of appropriation in meeting those challenges. Section III offers a brief overview of the history of changes in appropriation in Montana, and examines recent conflicts arising out of the DNRC's review process of changes. Section IV then focuses on the legislative responses to those conflicts. Sections V and VI compare Montana's change process to those in Colorado and Washington. This article concludes by offering recommendations to improve Montana's change process.

II. MONTANA RECOGNIZES WATER AS A FINITE RESOURCE.

While the challenges to change processes described in this article apply to all kinds of changes of appropriation, the last decade of the twentieth century and the first decade of this century have seen two developments in water law that were simply unimaginable fifty years ago: (1) the changes of existing surface water rights to mitigate for new

---

1. The term for "water right" varies from state to state. *See, e.g.*, MONT. CODE ANN. § 85-2-402 (2010) (in Montana, the Water Use Act uses the term "change in appropriation right"). *See also* ROBERT E. BECK, WATER AND WATER RIGHTS § 14.01(a) (2009) (describing some of this variation, and suggesting that a better term would be "reallocation").

2. *See infra* Part III.

3. *See* TED J. DONEY, MONTANA WATER LAW HANDBOOK 1-2 (3d ed. 1981) (discussing the growing pressures on Montana's water resources that accompanied the passage of the 1973 Water Use Act).

Published by U. of Denver, Fall 2010

groundwater development;[4] and (2) the transfer of consumptive-use water rights, with priority dates intact, to instream fishery uses.[5] Montana's change-in-appropriation process figures prominently in both of these developments.

A. CLOSING THE HYDROLOGIC LOOP: *TROUT UNLIMITED V. MONTANA DNRC* AND HOUSE BILL 831.

While conflict over water is nothing new in Montana,[6] in the last decade of the twentieth century, Montana moved with amazing speed in recognizing the limitations of its water supplies. Despite its sprawling size and rural character (the state still has only one area code), scarcity of water has long resulted in conflict— a conflict which has only grown as Montana's population grew. In addition to population growth, recent, successive years of drought turned irrigators' attention to new groundwater pumping as an answer to water shortages. Collectively, these factors—growing population, drought, and the state's inherent aridity—have heightened awareness of the limits of water in Montana.

In 1983, the Montana Legislature crafted a new tool to explicitly allow the state to close "highly appropriated" basins to new appropriations.[7] Prior to 1991 there were only four basin closures; one legislatively authorized basin closure of the Milk River basin,[8] and three basin closures adopted through administrative rule.[9] But over the next decade, this statutory landscape changed dramatically. By the end of the twentieth century, new surface water appropriations were no longer allowed in many of Montana's river basins.[10]

4. Act of May 3, 2007, ch. 391, § 15, 2007 Mont. Laws 1, 4.

5. Act of May 11, 1989, ch. 658, § 6, 1989 Mont. Laws 1719, 1724-26; *see also* Act of April 14, 1995, ch. 487, § 6, 1995 Mont. Laws 2339, 2346-47; Act of March 31, 1995, ch. 322, § 1, 1995 Mont. Laws 990, 991; Act of March 24, 2005, ch 85, § 6, 2005 Mont. Laws 1, 27-28.

6. *See, e.g.*, Columbia Mining Co. v. Holter, 1 Mont. 296 (1871) (pointing out that Montana's territorial Supreme Court heard cases as early as 1871).

7. Act of Apr. 12, 1983, ch. 448, § 17, 1983 Mont. Laws 984, 992-93; *see also* MONT. CODE ANN. § 85-2-319(1) (2010) (basin closure is the Montana term for legislative or departmental actions to "close" a river basin to new appropriations. "With regard to a highly appropriated basin or subbasin . . . the legislature may by law preclude permit applications or the department may by rule reject permit applications or modify or condition permits already issued").

8. MONT. CODE. ANN. § 85-2-321 (2010) (department order closing the main stream of the Milk River to surface water appropriations).

9. *See* MONT. ADMIN. R. 36.12.1011 (1990) (for Grant Creek Basin); *Id.* at 36.12.1013 (for Rock Creek Basin); *id.* at R. 36.12.1014 (1990) (for Walker Creek Basin).

10. The Montana Legislature has enacted permanent or temporary basin closures: *See* MONT. CODE ANN. § 85-2-330 (1993) (for the Teton River Basin); MONT. CODE ANN. § 85-2-336 (1995) (for the Upper Clark Fork River Basin); MONT. CODE ANN. § 85-2-341 (1993) (for the Jefferson and Madison River Basins); *Id.* § 85-2-343 (for the Upper Missouri River Basin); and MONT. CODE ANN. § 85-2-344 (1999) (for the Bitterroot River Basin). There are also legislatively approved basin closures in compacts: *see* MONT. CODE ANN. § 85-20-301 (1991) (for the Northern Cheyenne Reservation); MONT. CODE ANN. § 85-20-601 (1997) (for the Rocky Boy's Reservation); MONT. CODE ANN. § 85-20-901 (1999) (for the Crow Reservation); MONT. CODE ANN. § 85-20-1501 (2009) (for the Blackfeet Reservation); MONT. CODE ANN. § 85-20-801

Published by U. of Denver, Fall 2010

This has resulted in a large swath of southwest Montana closed to new surface-water appropriations. These basin closures, in turn, put pressure on new groundwater pumping to meet new water demand. In the Smith River basin, for example, fourth-generation ranchers saw their creeks, which were downstream of new groundwater-fed center pivots, run dry for the first time in a hundred years.[11] This led 11 ranchers and landowners in the basin, together with Montana Trout Unlimited, to challenge the DNRC's approach to groundwater permitting in closed basins.[12]

Ultimately, the Montana Supreme Court agreed with the senior water right owners. The Court held the agency accountable for its lack of integrated management, holding that the "Basin Closure Law serves to protect senior water right holders and surface flows along the Smith River basin."[13] In the wake of *Montana Trout Unlimited*, the DNRC needed a new way to look at groundwater pumping. Without a system in place to require mitigation of surface water depletions caused by new groundwater pumping, the agency effectively stopped processing new applications.[14]

In the eight months that passed between the Supreme Court's ruling and the start of the 2007 legislative session, pressure mounted to find a new way to thread the needle on groundwater pumping that did not diminish senior water rights. The answer lay, in part, in the use of Montana's change statute, section 85-2-402 of the Montana Code (section 402)[15] After a tortuous path through the 2007 legislative process, House Bill 831 passed on the last day of the session.

House Bill 831 prescribed a new review and permitting system, in which an applicant for new groundwater pumping has to perform an analysis of the depletions to surface water, then prepare a "mitigation plan" that explains how those depletions will be addressed.[16] In most cases, the new system requires a kind of "bucket-for-bucket" mitigation where an existing surface water right provides mitigation for the new consumptive-use amount of the proposed groundwater pumping. Typically, this means that an application to change a portion of an existing irrigation water right to a mitigation purpose accompanies the application for a new groundwater pumping permit.[17]

(1991) (for the U.S. Fish and Wildlife Service); and MONT. CODE ANN. § 85-20-401 (1994) (for the U.S. National Park Service).

11. Laura S. Ziemer, Eloise Kendy, & John Wilson, *Groundwater Management in Montana: On the Road from Beleaguered Law to Science-Based Policy*, 27 PUB. LAND & RESOURCES L. REV. 75, 76-77 (2006).

12. Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation, 2004 MT 250, ¶¶ 2-3, 2004 Mont. 1949.

13. Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation, 2006 MT 72, ¶30, 331 Mont. 483, 133 P.3d 224.

14. *See* Memorandum from Kim Overcast, New Appropriations Program Manager, Mont. Dep't of Natural Res. & Conservation, on the "*TU* Case" Implementation, to Water Resources Regional Managers and New Appropriations Staff, Mont. Dep't of Natural Res. (June 15, 2006).

15. MONT. CODE ANN. § 85-2-402 (2010).

16. H.B. 831, 2007 Leg. 60th Sess. (Mont. 2007).

17. MONT. CODE ANN. § 85-2-363(1) (2010).

Published by U. of Denver, Fall 2010

In the span of less than twenty years, Montana fully entered the twenty-first century's reality of limited water supplies and heightened water demand. Various factors—closing whole river basins to new appropriations, a growing population, and requiring mitigation for consumptive use from new groundwater pumping—have put the ability to change water from one use to another at the center of Montana's water management focus.

B. CHANGES TO INSTREAM FLOW: AN INCREMENTAL RESPONSE TO DROUGHT

Until 1969, Montana had not explicitly recognized that water left in stream was a beneficial use. In 1969 the legislature enacted the "Murphy Law," a law that came to be known by the name of the bill's sponsor, James E. Murphy.[18] The Murphy Law authorized the Montana Department of Fish Wildlife and Parks (DFWP) to file appropriations for instream fisheries use on twelve named streams within the state.[19] Between 1970 and 1971, the DFWP filed appropriations for what have come to be known as "Murphy Rights."[20] The priority dates on those rights date from the time DFWP filed them.[21]

In 1973, the Water Use act extended this right to secure instream appropriations to other state, federal, and local agencies by allowing for the filing of instream "reservations."[22] Priority is determined by the filing date of a notice of intent to seek a reservation.[23] Since its enactment, the DFWP and a number of other agencies have secured instream reservations throughout the Yellowstone and Missouri River basins.[24]

By the late 1980s, widespread, persistent drought revealed the infirmities of these new instream rights. In times of heightened demand and reduced supply, Murphy Rights and instream flow reservations, all with junior priorities, were of negligible use in keeping water instream. In the 1989 legislature, Trout Unlimited, leading a coalition of conservation groups, lobbied for and passed a bill that established a pilot program allowing the DFWP to lease water rights on

---

18. Act of Mar. 13, 1969, ch. 345, § 1, 1969 Mont. Laws 879; *see* TED J. DONEY, BASIC MONTANA WATER LAW 4 (C. Bruce Loble ed., 4th ed. 2010), http://courts.mt.gov/content/water/guides/basiclaw2010.pdf (last updated 2010).

19. Act of Mar. 13, 1969, ch. 345, § 1, 1969 Mont. Laws 879, 879-81.

20. TED J. DONEY, BASIC MONTANA WATER LAW 4 (C. Bruce Loble ed., 4th ed. 2010), http://courts.mt.gov/content/water/guides/basiclaw2010.pdf (last updated 2010).

21. *Id.*

22. Mont. Water Use Act, ch. 452, § 26(1), 1973 Mont. Laws 1121, 1134.

23. *Id.* at 1135.

24. *E.g.*, Application for Reservation of Water No.1781-r by the Mont. Fish & Game Comm'n and No. 10006-r by the Mont. Dep't of Health and Environmental Sciences (Mont. Dep't of Natural Res. & Conservation Dec. 15, 1978) (final order establishing water reservations); Water Reservation Application Nos. 72155-41A et al. in the Upper Mo. River Basin (Mont. Dep't of Natural Res. & Conservation Jul. 1, 1992) (findings of fact, conclusions of law, order, and memorandum).

Published by U. of Denver, Fall 2010

up to ten streams.[25]

In 1995, the legislature passed two bills establishing a similar instream pilot program, which allowed private entities, such as Trout Unlimited, to lease water for instream purposes.[26] The legislation allowing changes to instream use, whether it be under the DFWP legislation or the private option legislation, while not identical, both statutorily require DNRC review and approval of applications to change the purpose to the instream use, under section 402.[27]

III. A BRIEF HISTORY OF MONTANA'S CHANGE-IN-APPROPRIATION LAW.

Throughout the West, a key attribute of a water right has been the ability of the owner to change the purpose, place of use, or point of diversion of that water right without a loss of priority.[28] Montana has recognized the ability to change an existing water right since at least 1871.[29] In 1885, the Montana Legislature enacted its first statutory recognition of water rights changes, section 1882.[30] That provision stated,

> the person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.[31]

Section 1882 codified two important concepts in water law: (1) That a water right could be changed as to its place of diversion, place of use, and purpose of use; (2) as long as nobody is injured by the change. Implicit in the statute was that the water user could change the right and that it was then up to other water users to challenge it in court.

---

25. Act of May 11, 1989, ch. 658, § 6, 1989 Mont. Laws 1719, 1724. The 1989 enactment established a pilot period of four years, which the 1991 legislature extended to ten years. In 1999, and then in 2007, the legislature extended the pilot program until 2019. *See* Act of Mar. 19, 1999, ch. 123, § 2(2)(f), 1999 Mont. Laws 459, 461; Act of May 8, 2007, ch. 448, § 5, 2007 Mont. Laws, 1960, 1974.

26. Act of Apr. 14, 1995, ch. 487, § 6, 1995 Mont. Laws 2339, 2346; Act of Mar. 31, 1995, ch. 322, § 1(1), 1995 Mont. Laws 990, 991. In 2005, the Montana legislature merged the two 1995 enactments and removed the sunset date to make the private leasing statute permanent. *See* Act of Mar. 24, 2005, ch. 85, § 6, 9, 2005 Mont. Laws 253, 277, 280. *See also* TROUT UNLIMITED, PRIVATE WATER LEASING: A MONTANA APPROACH (2004) for a detailed discussion of the ten-year private leasing pilot program.

27. *See* MONT. CODE ANN. §§ 85-2-408(1)-436(2) (2009); *see generally* MONT. CODE ANN. § 85-2-402 (2010).

28. *See* Robert E. Beck, *Chapter 14: Reallocations, Transfers, and Changes, in* WATERS AND WATER RIGHTS 14-32 to -33, (Amy K. Kelley & Robert L. Beck eds., 3d ed. 2009) for an extensive discussion of the history of changes in appropriation.

29. *See* Columbia Mining Co. v. Holter, 1 Mont. 296, 300 (1871); *see also* Woolman v. Garringer, 1 Mont. 535, 542-43 (1872).

30. *See* MONT. REV. CODE ANN. § 89-803 (1947). §1882 was enacted in the 1895 Montana Civil Code, reenacted as § 4842 in the Revised Codes of Montana 1907, reenacted as §7095 in the Revised Codes of Montana 1921, and reenacted again as § 89-803 in the Revised Codes of Montana 1947.

31. MONT. REV. CODE ANN. § 89-803 (1947).

Published by U. of Denver, Fall 2010

The issue of "injury" (now "adverse effect" in the parlance of section 402[32] has been a cornerstone of change-of-appropriation analysis from the outset.[33] The characterization of adverse effect has been the source of substantial litigation over the past one hundred thirty years. As early as 1895, the Montana Legislature implicitly recognized that the concept of injury encompassed both the need to protect against: (1) the enlargement of the rights being changed,[34] and (2) changed conditions that could injure other water rights.[35]

Section 1882 and the cases construing it were the law of changes in Montana until 1973, when the Montana legislature passed the Water Use Act. While Montana's jurisprudence on changes in appropriation generally breaks out into "pre-1973" and "post-1973" components, much of the early common law as to injury remains valid in 2010.[36] The 1973 Water Use Act's real mark on the law of changes is its requirement to submit any contemplated change through a pre-change review by DNRC, and its clear shift in burden of proof. Because of the prominence that burden of proof holds in Montana's current change process, it is useful, if not vital, to understand the historical antecedents of the current law on burden of proof.

A. Burden of Proof Prior to July 1, 1973.

Section 1882 did not explicitly describe the relative burdens of those who sought to change a right and those who objected to the change, but the Montana Supreme Court settled the issue conclusively. In 1911, the Court held in *Hansen v. Larsen* that the party who asserts adverse effect had the burden to offer proof of the adverse effect.[37] Implicit within both section 1882 and the court cases following its passage, was the recognition that if one chose to change an appropriation, one simply implemented the change.

---

32. Hereafter, for consistency, the authors will use the term "adverse effect." MONT. CODE ANN. § 85-2-402(2)(a) (2010).

33. *See, e.g.*, Columbia Mining, 1 Mont. at 300; Woolman, 1 Mont. at 542-43.

34. In the Annotations to §1882, the compilers cited John N. Pomeroy and Carter P. Pomeroy, *Riparian Rights — the West Coast Doctrine (Continued)*, 2 W. COAST REP. 1, 5 (1884) ("The general doctrine [of that water diverted from the stream] is that. . .the prior appropriator is entitled to the exclusive use of water, up to the amount embraced for his appropriation, either for the original purpose or for any other or different purpose, *provided the amount is not thereby increased*. . . .") (emphasis added) [Editor's Note: Despite the title of this article, it is clear that the author is citing early prior appropriation caselaw in this portion of the text.]; Creek v. Bozeman Waterworks Co., 38, P. 459, 461-62 (Mont. 1894) (enlarged right by selling waste water out of watershed).

35. Holmstrom Land Co., v. Meagher Cnty. Newlan Creek Water Dist., 605 P.2d 1060, 1075 (Mont. 1979) (change in place of diversion); Columbia Mining, 1 Mont. at 300 (change in point of diversion reducing flow to plaintiff); Gassert v. Noyes, 44 P. 959, 962 (Mont. 1896) (change in pattern of return flow to detriment of junior downstream user).

36. DONEY, *supra* note 3, at 111 (emphasizing the role of pre-1973 law: "the determination of whether a proposed change is really a change or a new appropriation, and whether the change will adversely affect other rights, is made by applying prior law").

37. Hansen v. Larsen, 120 P. 229, 231 (Mont. 1911).

Published by U. of Denver, Fall 2010

The burden was on other water users to challenge the change. On occasion, an objector might act quickly enough to seek injunctive relief to stop a proposed change.[38] More typically, however, the issue would arise in either an action for damages,[39] or in an action seeking a decree of water rights within a given drainage.[40] As a practical matter, most proceedings were remedial rather than preventive.

B. THE 1973 WATER USE ACT—A SEA CHANGE IN MONTANA WATER LAW.

In 1973, the Montana legislature passed the Water Use Act (or the "Act"),[41] completely re-codifying Montana's water use laws, and giving the newly-mintedDNRC[42] and its citizen Board of Natural Resources (Board)[43] new regulatory powers to approve or deny both new uses and changes in appropriations before their implementation.[44] While the Act was careful to ratify all existing changes in appropriation, it left implementation of the Act's key provisions entirely in the hands of the Board and DNRC, with virtually no guidance or constraint.[45]

The enactment of the 1973 Water Use Act gave first, the Board, and then DNRC itself, broadly-based rulemaking authorities.[46] But, with the exception of a few definitional rules and rules on fees, the agency engaged in no rule making that addressed either the substance or process of change and permit applications until 2005.[47] In 1980, the agency embarked on a rulemaking effort to more fully describe the application requirements for both water-use permits and changes in appropriation.[48] The agency did not, however, adopt those rules.

Instead, for the thirty-two years between 1973 and 2005, the department maintained a variety of internal guidance documents that purported to assist agency personnel in the processing of change applications.[49] These guidelines did not receive any pre-adoption

---

38. *See, e.g.*, Holmstrom Land, 605 P.2d at 1075.

39. *See, e.g.*, Wollman v. Garringer, 1 Mont. 535, 537 (1872).

40. *See, e.g.*, Hansen, 120 P. at 230.

41. Mont. Water Use Act, ch. 452, § 1, 1973 Mont. Laws 1121.

42. 1971 Executive Reorganization Act, ch. 272, § 1, 1971 Mont. Laws 1091, 1094, 1145 (creating the DNRC).

43. *Id.* at 1147 (creating the Board of Natural Resources and Conservation); 1995 Executive Reorganization Act, ch. 418, § 500, 1995 Mont. Laws 1540, 1878 (abolishing the Board of Natural Resources and Conservation).

44. Mont. Water Use Act, ch. 452, §§ 16, 28, 1973 Mont. Laws 1121, 1129-31, 1135.

45. Mont. Water Use Act, ch. 452, § 4-5, 1973 Mont. Laws 1121, 1123-24.

46. MONT. CODE ANN. § 85-2-113(2) (2009).

47. *See generally* MONT. ADMIN. R. 36.12.101 (2009) (effective in 1973, offering only definitions); MONT. ADMIN. R. 36.12.1801 (2009) (effective in 2005, affecting the appropriation process); MONT. ADMIN. R. 36.12.1901 (2009) (effective in 2005, affecting the change application process).

48. *See* MONT. DEP'T NATURAL RES. & CONSERVATION, DRAFT RULES FOR APPROPRIATION OF WATER IN MONTANA (proposed Nov. 1980).

49. Interview with Terri McLaughlin, Water Rights Bureau Chief, Mont. Dep't Natural Res. & Conservation, in Helena, Mont. (Aug. 27, 2010) (referring to MONT. DEP'T NATURAL RES. & CONSERVATION, CHANGE PROCESS MANUAL (created in Sept.

Published by U. of Denver, Fall 2010

public review and comment[50] before their implementation.[51] In fact, a former regional manager recalls that leadership within the water resources division of DNRC actively rejected his suggestion that DNRC promulgate rules for processing applications, arguing that it would "limit the agency's flexibility."[52]

Nonetheless, the Water Use Act set up a basic framework for the review of applications for permits for new uses and changes that, on its face at least, seems a rational roadmap to either approve or deny an application.[53] The progression is simple: (1) the applicant submits an application that DNRC reviews for correctness and completeness;[54] (2) once DNRC determines that the application is correct and complete, it publishes notice of the application to provide an opportunity for objection;[55] (3) if DNRC receives valid objections, it holds a contested case hearing;[56] (4) after publication of the public notice or completion of the hearing, the DNRC has a specific amount of time within which to grant, with or without conditions, or deny the application.[57] If it only were so simple.

Significantly—- in hindsight —- the 1973 Water Use Act did not explicitly address the burden of proof as to either new use permits or changes in appropriation.[58] But section 302 of the Act did describe an application process for new water use permits that required the agency to return applications for "correction and completion."[59] DNRC interpreted this language to refer to change applications as well.[60] As

---

1997). This manual was a ninety-five-page compendium that included detailed descriptions of office procedure; general descriptions of what information is necessary to constitute a correct and complete application; descriptions of what constitutes "salvage;" and some discussion of how to document historical beneficial use, and of applicant's burden to show no adverse effect. While the document is expansive in the breadth of topics is covers, it provides no guidance as to what DNRC considers acceptable methods of proof on such things as historic consumptive use, return flow analysis or elements of proof. It continues to be part of DNRC internal guidance, and the department updated it in 2009).

50. MONT. CODE ANN. § 2-4-102(11)(a) (2009) (defining "rule" to include "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency."); *Id.* at §2-4-301(1) (requiring prior notice and opportunity for public comment on any proposed rules).

51. Interview with Mike McLane, Water Rights and Instream Flow Specialist, Mont. Dep't of Fish, Wildlife & Parks, in Helena, Mont. (Sept. 3, 2010) (former Reg'l Manager of the Missoula Reg'l Office of the DNRC Water Res. Div.).

52. *Id.*

53. *See* MONT. CODE ANN. §§ 85-2-302 to -311 (2009).

54. *Id.* §§ 85-2-302, -402.

55. *Id.* § 85-2-307.

56. *Id.* § 85-2-309.

57. *Id.* § 85-2-310.

58. Mont. Water Use Act, ch. 452, §§ 16, 18, 1973 Mont. Laws 1121, 1129-31, 1135.

59. Mont. Water Use Act, ch. 452, § 22, 1973 Mont. Laws 1121, 1130. Out of this phrase arose some of the most contentious debates about DNRC's review of both water use permits and changes of appropriations. *See infra* Part III C.

60. *See* Act of Apr. 16, 1993, ch. 370, §§ 2-3, 1993 Mont. Laws 1221, 1225, 1233 (inserting the words, "[a]n applicant shall submit a correct and complete application" into both §§ 85-2-302 and 402).

Published by U. of Denver, Fall 2010

discussed below, the issue of what is "correct-and-complete" became entangled in DNRC's efforts to define burden of proof, and as a result has been one of the most contentious elements of modern change-in-appropriation jurisprudence in Montana.

C. CORRECT-AND-COMPLETE, BURDEN OF PROOF, AND THE SHIFTING SANDS OF AGENCY DISCRETION.

In the years immediately following the enactment of the Water Use Act, there was considerable ambivalence about what, if any, change in the burden of proof had occurred.[61] In fact, in the decade following the passage of the Water Use Act, both department legal staff and hearings examiners determined that the burden of proof, not having been addressed in the 1973 enactment, remained as it was prior to the Water Use Act—in short, the burden remained with the objector, not the applicant, to prove adverse effect.[62]

Some field offices, where local staff would review change applications, took a slightly less forgiving view that the filing of a complete application sufficed to meet the applicant's initial burden of proof, and that the burden then shifted to the objector.[63] In short, if DNRC found the application was "correct and complete,"[64] and there were no objections, then the DNRC would approve the change. This view appeared to prevail at the contested case level as well.[65] But even

61. Application for Beneficial Water Use Permit No. 020736-s41H by the City of Bozeman and Application to Sever or Sell Appropriation Water Right No. 20737-s41H, 36 (Mont. Dep't of Natural Res. & Conservation Apr. 16, 1985) (notice of correction). The DNRC Hearings Examiner explicitly held that, while the applicant in a change or new use application has a burden to prove the necessary criteria by substantial credible evidence, the objector likewise has a "burden of going forward with the evidence such that reasonable minds can differ over the scope and intent of their asserted water rights. . . . In addition, the objectors have the burden of production on the question of the type and character of the injury complained of by [the applicant's] proposed change." (citations omitted). In 1981, Ted Doney, who was the chief legal counsel at the DNRC during the inception of the Water Use Act, stated: "Several cases under prior common law held that the burden fell on the party alleging injury to his water right. It would seem that this would also be the case under the Water Use Act where objections have been filed: the objector would have the burden of showing how he will be adversely affected by the change. But there is support for the proposition that the applicant must first show by a general negative that his proposed change will not interfere with the rights of others." (citations omitted). DONEY, *supra* note 3, at 113.

62. *See* Memorandum from Ronda L. Sandquist, Legal Counsel, to Donald D. MacIntyre, Chief Legal Counsel for the Mont. Dep't of Natural Res. and Conservation (Jan. 24, 1980) (on file with author); *see also* Application for Change of Appropriation Water Right No. 8772-c41QJ by John E. Palo, 38 (Mont. Dep't of Natural Res. & Conservation 1977) (memorandum in support of order denying a motion to dismiss application) (on file with author), in which the hearing examiner said, "[t]he applicant for change of appropriation does not , at the hearing upon the objections, have the burden of proving that all the criteria for the issuance of a permit have been met."

63. Interview with Mike McLane, *supra* note 51.

64. The issue of what is "correct and complete" has persisted for many years as a source of friction between applicants and the DNRC. *Supra* note 60, at § 2.

65. *See* Application for Change of Appropriation Water Right No. G(W)31227-01-41F by Shining Mountains Owners Ass'n, 16 (Mont. Dep't of Natural Res. &

Published by U. of Denver, Fall 2010

with this implicit approval of a slight burden shift to the applicant, DNRC field offices were largely left to their own devices to determine what level of information was necessary to meet the "correct and complete" standard.[66] In some cases, in the mid-1980s, this led to field personnel actually assisting the applicants in filling out the application.[67]

In 1991, the Montana Supreme Court appeared to have conclusively settled the issue as to the relative burden between applicant and objector. In the *Royston* case, the applicants for a change of appropriation argued that the language in section 85-2-402(2) of the Montana Code applied only to the initial application stage, but once someone objected to the change, the burden shifted to the objector.[68] The court emphatically rejected this assertion, stating:

[T]he statutory scheme set forth in the Water Use Act has re-assigned this burden. The placement of the burden on the applicant also conforms to general rules regarding burdens of proof. "The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence." . . . Under the statute here, the applicant would be defeated if neither side produced evidence. Also, except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting. . . . The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. The plain language of the statute now clearly places the burden on the applicant.[69]

Curiously, at least some DNRC hearing examiners appeared to continue to adhere to the "correct-and-complete" theory of initial burden.[70] Meaning that as late as 1997, the DNRC continued to approve changes when it found an application to be correct and complete and to which there were no objections. But by 2002, the

---

Conservation 1990) (final order), in which the hearing Examiner said: "[i]n the absence of objections or other contrary evidence, a correct and complete application usually is sufficient to meet the burden, if it sets forth the kind and character of the proposed change(s). Objectors then have the burden of producing information about the utilization of their own water rights and offering a plausible argument that the proposed changes would cause adverse effects to their rights." (citation omitted). Applicant had met his initial burden by submitting a correct and complete application. The information provided by applicant to address the criteria for issuance of an authorization to change was reviewed by the department, which determined that with respect to the information provided that the criteria were met." *Id.*

66. Interview with Mike McLane, *supra* note 51.

67. *Id.*

68. *In re* Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston, 816 P.2d 1054, 1057 (Mont. 1991).

69. *Id.*(citations omitted).

70. *See* Application for Change in Appropriation of Water Right No. G(P) 011185-43D by Sam H. McDowell, 8 (Mont. Dep't of Natural Res. & Conservation 1997) (proposal for decision), in which the hearing examiner stated, "[a]pplicant had met his initial burden by submitting a correct and complete application."

Published by U. of Denver, Fall 2010

ground appeared to have shifted. In a DNRC publication entitled "Water Right Changes: Information and Instructions," the DNRC stated, as to the import of "correct and complete":

> If the department judges your application to be correct and complete, it does not mean that the authorization to change will be issued. Rather it insures [sic] that it contains *substantial credible information, which,* as defined by statute means *'probable believable facts to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.'* Simply stated, a correct and complete application contains information sufficient for the Department to understand, evaluate, and render a decision on your application. . . . *Note that the application may be approved with conditions or denied even if there are no objections or if all objections are withdrawn.*[71]

This appears to be a departure from the "correct-and-complete-as-prima-facie-evidence-approach" announced in earlier agency decisions.[72]

The other part of the burden-of-proof equation goes to the degree of proof. For many years, both the legislature and DNRC struggled with what the appropriate standard of proof should be. In the 1973 enactment, neither the permitting statute nor the change statute contained any description of the burden of proof. In 1985, the legislature amended the change statute, section 402, at least as to the level of proof, to explicitly require that the appropriator prove "by substantial credible evidence that the following criteria are met."[73] And in 1993, the legislature further modified the degree of the burden by replacing "substantial credible evidence" with "preponderance of the evidence."[74] However at the request of DNRC, that legislature also enacted a definition of "correct and complete" that required applicants to submit "substantial credible information."[75] Thus, in an effort to clarify the meanings of these terms,[76] the seeds of further confusion

71. *See* MONT. DEP'T OF NATURAL RES. & CONSERVATION, WATER RIGHT CHANGES: INFORMATION AND INSTRUCTIONS, 606 Ins. N 8/02 (second emphasis added).

72. MONT. DEP'T NATURAL RES. & CONSERVATION, CHANGE PROCESS MANUAL (Sept. 1997) (legislature changed MONT. CODE ANN. § 85-2-402(2) (1985)).

73. Act of July 1, 1985, ch. 573, § 7, 1985 Mont. Laws 1180.

74. Act of April 16, 1993, ch. 370, § 7, 1993 Mont. Laws, 1221, 1233.

75. *Id.* § 1, 1222-23; *See* MONT. CODE ANN. § 85-2-102(8) (2010) which defines "correct and complete" to mean "that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information." *See also id.* § 85-2-102(22) which defines "substantial credible information" as "probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information."

76. *A Bill for an Act Entitled "An Act Clarifying the Burdens of Proof and Standards of Proof Under Which Applications for Beneficial Water Use Permits, Change Authorizations, And Reservations Are Processed Pursuant to Montana Water Laws; Clarifying the Process for Extension of Time for a Water Use Permittee to Complete Permit Conditions; Clarifying the Verification Process for Issuance of a Permit:" Hearing on SB 231 Before the Senate Natural Res. Comm.*, 53rd Leg. (Mont. 2003) (statement of Mont. Dep't of Natural Res. & Conservation). The only witness on the bill, aside from the bill's sponsor, was Donald

Published by U. of Denver, Fall 2010

were sown.

DNRC's efforts to decode these descriptions of burden led to a confusing mosaic of definitions. Even before the 1985 enactment of the "substantial credible evidence" language, DNRC hearings examiners stated that such evidence meant "that quantum and quality of proof that will convince a reasonable man of the existence of the ultimate fact."[77] Consistently, DNRC decisions noted that "preponderance of evidence" is a higher standard than "substantial credible information."[78] But at times DNRC seemed to conflate the two, as when a hearings examiner asserted that an "[a]pplicant must prove by preponderance of substantial credible evidence that the proposed appropriation will not adversely affect other appropriators."[79]

One feature of Montana's change process in which the issue of "correct and complete" causes the most consternation is the proof of "historical beneficial use." The issue of what constitutes historical beneficial use, as it pertains to changes in appropriation, is complex in Montana. The passage of the 1973 Water Use Act bifurcated Montana's water rights into two kinds—those that pre-dated July 1973 (the effective date of the Water Use Act) and those that originated as water use permits after July 1, 1973.[80] Since most changes involve senior, pre-1973 rights, the lion's share of change applications must offer proof of historical beneficial use prior to 1973.[81] This poses a number of challenges.

As in most other western states, "historic beneficial use" encompasses not only flow rate and volume diverted, but also the volume of water consumed by the water use.[82] The estimate of "historic

---

MacIntyre, chief counsel of DNRC. Mr. MacIntyre went to some length to explain the shift to "preponderance of evidence" and the distinction between preponderance and substantial evidence, but he only discussed the proposed definition of "correct and complete" in passing, and offered no insight into the rationale for including "substantial credible information" in the definition of "correct and complete."

77. Application for Beneficial Water Use Permit No. 24921-s41E by Remi & Betty Jo Monforton, 2 (Mont. Dep't of Natural Res. & Conservation Sept. 30, 1981) (final order).

78. *See* Application for Beneficial Water Use Permit No. 020736-s41H by the City of Bozeman and Application to Sever or Sell Appropriation Water Right No. 20737-s41H, 37 (Mont. Dep't of Natural Res. & Conservation June 21, 1984) (proposal for decision).

79. Application for Beneficial Water Use Permit No. 64545-g76H by Mike McBride, 11 (Mont. Dep't of Natural Res. & Conservation Sept. 29, 1988) (proposal for decision).

80. MONT. CODE ANN. § 85-2-301 (2010).

81. MONT. ADMIN. R. 36.12.1902(1)(a) & (b) (2010). Prior to the promulgation of the 2005 rules, the requirement of proof of pre-July 1 1973 use—what and how much—appeared to be largely an artifact of regional discretion. In some offices, little beyond Water Resources Survey Maps was necessary. (For a discussion of the Water Resource Surveys *see infra* note 85.) Telephone Interview with Andy Brummond, former Water Res. Specialist, Lewistown Reg'l Office of the DNRC Water Res. Div. (Sept. 15, 2010). In other offices, the applicant would be required to supplement the Water Resource Survey information with a Blaney-Criddle estimation of historic consumptive use. *See* Hoxworth Application and Supplement to Change Water Right No. 76F 110686 (on file with author).

82. MONT. ADMIN. R. 36.12.1902(7)(n) (2010).

Published by U. of Denver, Fall 2010

beneficial use" is important because it goes to the issue of enlargement; it is impermissible to enlarge the consumptive use of an existing water right through a change.[83] In order to determine such an increase, it is essential to determine the extent of historic consumptive use.

There is little measured documentation of most pre-1973 water rights. Prior to 1973, most water users did not have any kind of measuring devices on their diversions; nor did most users keep detailed crop production records that might be helpful in characterizing the extent of historic irrigation.[84] This leaves the applicant in the position of having to cobble together patchwork evidence describing beneficial use.

Components of that patchwork might include: aerial photos pre-dating 1973; current photos of old irrigation works; historic photos of irrigation activities on the relevant lands; Water Resource Survey maps and notes[85]; diaries or log books kept by irrigators (difficult to come by); affidavits of "old timers" who have some recollection of the irrigation practices on given lands 40 years ago (a dying resource);[86] or water commissioners' notes.[87] While these tools do not offer much precision as to specific flow rates and volumes of water diverted and consumed, they can provide a sufficient background against which to compare the consumptive use of a proposed new use of the right.

For many years after the passage of the 1973 Water Use Act, the issue of "historic beneficial use" did not appear to be a factor in DNRC's consideration.[88] As late as 1997, DNRC approved a change to instream use without requiring any estimate of historic consumptive

83. *See, e.g.*, Columbia Mining Co. v. Holter, 1 Mont. 296, 300 (1871); Woolman v. Garringer, 1 Mont. 535, 542-543 (1872).

84. In fact, even in 2010 most water users do not measure their diversions unless there is a court decree on the stream that is administered by a water commissioner. Stan Bradshaw, *A Buyer's Guide to Montana Water Rights*, at *7, *available at* http://www.tu.org/conservation/western-water-project/montana, (then the hyperlink "A Buyer's Guide to Montana Water Rights").

85. The Water Resources Surveys are a series of publications produced in the middle part of the last century by the State Engineer's Office. The publications documented known irrigation use, by county, for most of the state. While the publications themselves are helpful (mapping irrigated land, point of diversion, and ditch locations), the work product that was used to create the publications, referred to as "survey notes" is often more so.

86. DNRC has expressed an unresolved ambivalence about the value of "old-timer" recollections via affidavit. On one hand, DNRC found that one basis for denial of a change application to instream flow was the applicant's failure to provide contemporaneous accounts of pre-1973 irrigation. *See* Application No. 43BV-30011611 to Change Water Right Nos. 43BV-6888, 43BV-143439, 43BV-143441, & 43BV-143442 by Vermillion Ranch Ltd., 27-28 (Mont. Dep't of Natural Res. & Conservation Oct. 16, 2009) (final order). On the other hand, one DNRC regional office reviewer informed an applicant that he accorded them little weight, and that an affidavit is insufficient to reliably prove pre-1973 irrigation use. Telephone Interview with Damon Pellicori, former Water Res. Manager, Mont. Water Trust (Sept. 14, 2010).

87. MONT. ADMIN. R. § 36.12.1902(9)(e) (2010).

88. *See, e.g.* MONT. DEP'T OF NATURAL RES. & CONSERVATION, RULES FOR APPROPRIATION OF WATER IN MONTANA (first draft Nov. 1980) (on file with author). This draft rule did not define either "historic beneficial use" or "consumptive use."

Published by U. of Denver, Fall 2010

use.[89] In fact, as recently as 2004, the change application form did not even request information on historic consumptive use, but some reviewers were requiring analysis of such use by then.[90] Today, DNRC's regulations and application form suggest that a much higher degree of accuracy is not only possible, but necessary.[91] Still, DNRC has struggled with the challenge of evaluating historic consumptive use when there is little direct evidence of quantifying that use.[92]

From an applicant's standpoint, one of the most frustrating aspects of DNRC's evolving understanding about how much information is necessary to support an assertion of "no adverse effect" is that the DNRC's movement to using a higher standard was largely unaccompanied by any systematic effort to bring the regulated public along. While some regional offices made efforts to develop some guidance for prospective applicants, the "central office" in Helena, did little in this regard.[93] As a result, people who represented applicants in

---

89. *See* Authorization to Change Water Right No. 76M-(W) 015976 (Mont. Dep't of Natural Res. & Conservation June 19, 1997) (on file with author).

90. *See* MONT. DEP'T OF NATURAL RES. & CONSERVATION, APPLICATION TO CHANGE A WATER RIGHT, FORM 606 R8/03 (on file with author) on which Hoxworth Application to Change Water Right No. 76F-3001112 (Mont. Dep't of Natural Res. & Conservation May 28, 2004) was filed, and in which there was a discussion of historic consumptive use (on file with author).

91. MONT. ADMIN. R. § 36.12.1902(7) (2009). DNRC currently requires the applicant to describe the historic use of supplemental rights (those in which there is some overlap—place of use, point of diversion—with the right being changed) as follows: "C.5. Identify the historic flow rate diverted from each point of diversion, and explain how the amount was determined. C.6. Identify the historic diverted volume from each point of diversion and explain how the amount was determined." MONT. DEP'T OF NATURAL RES. & CONSERVATION, APPLICATION TO CHANGE A WATER RIGHT, FORM 606 R 06/2010, *available at* http://www.dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/606.pdf. In many cases, especially where there were not historically shortages between users, supplemental rights were simply comingled regardless of priority date. To impart, forty to sixty years later, what went precisely where and how much is practically impossible in most cases.

92. Application No. 43BV-30011611 to Change Water Right Nos. 43BV-6888, 43BV-143439, 43BV-143441, & 43BV-143442 by Vermillion Ranch Ltd., 27-28 (Mont. Dep't of Natural Res. & Conservation Oct. 16, 2009) (final order). In this denial of an application to change irrigation rights to instream flow, the DNRC found the following insufficient to quantify historic irrigation: pre-1973 aerial photos of historic irrigation; Water Resources Survey maps and photos; Water Resources Survey notes; calculation of crop production and water consumption based on NRCS formulas; inventory of NRCS soil types; Water Commissioner notes; irrigators' testimony of irrigation practices over the last ten years; and stipulation to objectors' estimates of the degree of partial-service irrigation. The DNRC's Final Order did not indicate whether the Department disputed the parties' agreed stipulation as to the percentage of partial service irrigation based on objectors' infra-red photographs, or whether it was the lack of pre-1973 testimony as to actual irrigation practices and crop production that meant that the applicant had not met the burden of proof for historic beneficial use. Curiously, the DNRC's Final Order also did not provide an explanation of how the estimates of partial service irrigation were insufficient, or how the applicant failed to meet the burden of proof.

93. Telephone Interview with Andy Brummond, *supra* note 81. Mr. Brummond indicates that he developed WATER RIGHT CHANGES: INFORMATION AND INSTRUCTIONS *supra* note 71, in 2002 in an attempt to provide applicants with at least some starting point in completing the application. While that instruction sheet underscored the importance of providing "detailed information" proving the historical use of the

Published by U. of Denver, Fall 2010

change applications found themselves facing a new, higher standard of proof just to arrive at the "correct and complete" phase.[94] And if the general public felt largely in the dark about what level of information the new standard required, it appears that DNRC employees often felt similarly.[95] As a practical matter, between 1973 and 1997, the central office disseminated information to regional review staff on an ad hoc basis via memoranda, and at annual gatherings.[96] Since 1997, DNRC has provided its review staff with a Change Process Manual that provides some general detail as to their responsibilities in processing changes.[97]

With the apparent lack of clear guidance from DNRC on issues such as "correct and complete," and as DNRC's scrutiny of applications increased, conflicts inevitably ensued. These conflicts arose both from the reigning confusion over what "correct and complete" meant, and from the perception that the agency took an inordinate and—in the eyes of a number of applicants, unconscionable—amount of time to act upon applications.[98] Complaints began to surface about both the seeming opacity of the DNRC's "correct and complete" review and about the time it took to get a decision out of the agency.[99] DNRC estimates that, by 2003, it was receiving about 1,500 applications per year, and that process time ranged between nine months to two years.[100]

---

water right, it did not explain what kind of information would be helpful in that regard. The DNRC later adapted Mr. Brummond's form for use on its website. Form 606, the change application form, still did not include any reference to "historic beneficial use."

94. Telephone Interview with John Bloomquist, Water Rights Attorney, Doney, Crowley, Bloomquist, Paine, Uda P.C. (Sept. 16, 2010).

95. Telephone Interview with Andy Brummond, *supra* note 81. Mr. Brummond noted that when he worked with the DNRC in the Lewistown office, the DNRC offered no formal training, either in basic water law concepts relevant to changes or in the technical information necessary for an application to be considered "correct and complete." He was fortunate to have a regional manager with experience in the job that actively worked with him, but it was nonetheless an "on-the-job" learning experience. From his communication over the years with other regions, it was clear that the level of knowledge varied widely from region to region. During his time with the DNRC, he was aware of no formal training that DNRC offered to its water resource specialists. As of 2010, training is still largely left up to regional offices to provide with weekly communication with central program staff. Telephone Interview with Terri McLaughlin, *supra* note 49.

96. *See* Interview with Mike McLane, *supra* note 51; *see also* Telephone Interview with Terri McLaughlin, *supra* note 49.

97. Telephone Interview with Terri McLaughlin, *supra* note 49; *see also* MONT. DEP'T OF NATURAL RES. & CONSERVATION, CHANGE PROCESS MANUAL (1997) (on file with author).

98. *See* MONT. CODE ANN. § 85-2-302 (2001). As passed in 1973, this section contained no deadlines upon the department to reach a correct-and-complete determination. The DNRC was equally unconstrained by any deadlines for change applications. *See* MONT. CODE ANN. § 85-2-402(1)(b) & (8) (2009).

99. By 2002, the DNRC, in its application instructions, offered up some warning to prospective applicants: "you should file your application at least one year in advance of the time you intend to make your change." WATER RIGHT CHANGES: INFORMATION AND INSTRUCTIONS, *supra* note 71.

100. *A Bill to Revise Laws Governing Water Use Permits & Changes in Appropriation Rights: Hearing on H.B. 720 Before the H. Comm. on Agriculture*, 58th Leg. (Mont. 2003) (statement of Jack Stults, former Div. Administrator, Water Res. Div., Mont. Dep't. of Natural Res. & Conservation).

Published by U. of Denver, Fall 2010

However, there were accounts of filed applications taking upwards of two to five years to get a "correct and complete" determination and subsequent public notice.[101] In a number of cases the applicants attributed this delay to opaque and ever-shifting substantive proof requirements[102] to reach a "correct and complete" determination.[103] From DNRC's perspective, part of the challenge was one of workload.[104] In either event, by 2003, the situation was ripe for a legislative solution.

IV. THE MONTANA LEGISLATURE'S RESPONSE TO AGENCY CONTROVERSY.

A. HOUSE BILL 720—A 2003 RESPONSE TO DNRC REVIEW ISSUES.

In 2003, House Bill 720 became the vehicle by which the legislature addressed the growing chorus of complaints about the DNRC process of reviewing applications for new permits and changes of appropriation. The committee minutes of the hearing, while incomplete, clearly delineate the grievances of the bill's proponents. For example, one water rights attorney recounted an application on which DNRC took a full year to reach a correct and complete determination.[105]

Consequently, House Bill 720's principle revision established an explicit time frame—180 days from the filing of the application—in which DNRC must notify an applicant of any defects in the application in order to meet the "correct and complete" criteria.[106] Failure of DNRC to act with the 180 days would result in an automatic finding that the application is correct and complete.[107] In addition, the bill required the DNRC to adopt rules to describe when an application is correct and

101. Telephone Interview with John Bloomquist, *supra* note 94. In the case of the Application to Change Water Right by Vermillion Ranch, *supra* note 92, it took two years between filing and public notice, and another three years to reach a final decision.

102. Prior to 2005, when DNRC finally adopted rules under MAPA (*See infra* Part IV A below), DNRC had not adopted rules that described the level of detail the DNRC expected with regard to such issues as adverse effect. While there were some informally developed informational pieces, these appear to have been offered, or even observed, haphazardly. In the realm of changes, this lack of clarity and uniformity was especially troublesome because applicants are required to discuss historic use prior to July 1, 1973—both in terms of the amount diverted and the amount consumed. Because there were few measured diversions prior to July 1, 1973 (there are still very few measured ditches, for that matter), assembling proof of historic use is an exercise in the gathering of piecemeal, anecdotal evidence—affidavits from old-timers, aerial photographs of irrigated acreage, and any other evidence that provides some insight into pre-July 1, 1973 use. The more time that elapses between July 1, 1973 and the time of an application, the more problematic it becomes to meet this standard.

103. Telephone Interview with John Bloomquist, *supra* note 94.

104. *See Hearing on H.B. 720, supra* note 100, at 7. Of the 109 DNRC employees, fourteen reviewed water right applications.

105. *Hearing on H.B. 720, supra* note 100, at 4 (statement of Jim Lippert, Big Timber).

106. Act of May 5, 2003, ch. 574, §1, 2003 Mont. Laws 2409, 2409-410.

107. *Id.*

Published by U. of Denver, Fall 2010

complete, and explicitly required the rules to be adopted pursuant to the Montana Administrative Procedure Act rule-making provisions.[108]

To its credit, DNRC moved relatively quickly to propose rules describing what is necessary to meet the correct and complete criteria, to solicit public comment, and to adopt rules. In January 2005, for the first time, the Department adopted rules that described what must appear in an application to be correct and complete.[109]

At the same time as the rule-making effort, DNRC took a number of actions directed at improving public access to information related to its change and permitting functions. Most notable among these were (1) the upgrading of its website to provide access to DNRC references and water rights information;[110] (2) the adoption of a five-year strategic plan, which among other things, committed to "improv[ing] public involvement in division decision-making by creating and maintaining a Water Resources Advisory Committee that would meet semi-annually to discuss pertinent and timely topics."[111] Given the historic lack of public involvement, this was a promising commitment. To date, DNRC has not convened the advisory group.[112]

Unfortunately, House Bill 720 and the 2005 rulemaking effort was not the fix that everyone hoped for.

B. TOWN OF MANHATTAN—GOOD INTENTIONS FOILED BY PROCESS.

The town of Manhattan, Montana, got caught in the DNRC's paradigm shift regarding change applications. Manhattan, a small town of about 1,500 people along the Gallatin River, had the misfortune of applying for a new groundwater pumping permit after the 2005 rule adoption and just after the Montana Trout Unlimited decision, but before there was a clear path forward for new groundwater appropriations.[113] Otherwise, Manhattan was doing all the right things—it was annexing new growth into the town, it was connecting that new growth to central water and sewer, and it had just invested in an upgrade on its water treatment facility.[114]

---

108. MONT. CODE ANN. § 85-2-302(2).

109. MONT. ADMIN. R. 36.12.1601 (2005).

110. *See Water Resources Division*, MONT. DEP'T OF NATURAL RESOURCES & CONSERVATION, http://dnrc.mt.gov/wrd/ (last visited Nov. 7, 2010). The website has steadily added improvements over the past five years: electronic versions of the Water Resource Surveys; electronic access to water rights abstracts with some limited GIS mapping of water rights claims; and electronic access to certain reference publications useful to the application process (e.g. DNRC hydrologic studies, pond evaporation methods, and new appropriation rules).

111. *See* MONT. DEP'T OF NATURAL RES. & CONSERVATION, DNRC WATER RESOURCE DIVISION STRATEGIC PLAN 2005-2010 7, *available at* http://www.dnrc.mt.gov/wrd/about_us/about_wrd/wrd_strategicplan05.pdf.

112. Email from Teri McLaughlin, Bureau Chief, Water Rights Bureau, Mont. Dep't of Natural Res. & Conservation, to Stan Bradshaw, Staff Attorney, Mont. Water Project, Trout Unlimited (Sept. 16, 2010, 12:03 PM) (on file with author).

113. Application for Beneficial Water Use Permit No. 41H-30021840 by Town of Manhattan, 4-5 (Mont. Dep't of Natural Res. & Conservation Dec. 9, 2008) (proposal for decision).

114. *Id.* at 5; Application for Beneficial Water Use Permit No. 41H-30021840 by

Published by U. of Denver, Fall 2010

The town's application proposed to pump 575 gallons per minute, for 560 acre-feet per year to accommodate a proposed 363-lot subdivision within city limits.[115] The application, which proposed to pump near the lower Gallatin River, caught the attention of senior surface water users.[116] In an attempt to avoid a showdown, senior users met with the developer of the subdivision and city officials prior to the deadline for filing objections on the town's water use application.[117] They requested that the town of Manhattan commit to a plan to mitigate the new consumptive use of the proposed development, in order to avoid any depletion in surface water flows.[118] This would address the concerns of senior users while allowing the proposed groundwater pumping to proceed through permitting.

Just upstream on the Gallatin, a private, municipal water provider, Utility Solutions, Inc., had recently pioneered such a mitigation plan in cooperation with the same set of senior water users.[119] There, Utility Solutions changed part of a senior irrigation right into a mitigation right offsetting the new consumptive use of the planned residential and commercial development.[120] In this way, the retirement of an existing, senior irrigation use balanced the new groundwater pumping.

Unfortunately, Manhattan was unfamiliar with what Utility Solutions had done and did not readily see the need to provide mitigation water.[121] Senior water users filed objections to the town's groundwater pumping application.[122] The town of Manhattan ultimately contracted with water attorney, Matt Williams, who had helped Utility Solutions navigate the change-in-use of the senior irrigation right that cemented the settlement agreement with the senior water users.[123] It took almost two years, but by May of 2008, Manhattan and the senior water users had constructed a settlement agreement that again relied on a change-in-use of senior irrigation water to mitigate the proposed groundwater depletions to the Gallatin River.[124]

But the long-awaited settlement with the objectors was merely the start of the town's procedural entanglement with the DNRC. Even though the objections were settled, DNRC decided that it had to hold a contested case hearing on the town's groundwater pumping

---

Town of Manhattan, 13 (Mont. Dep't of Natural Res. & Conservation Dec. 8, 2009) (final order).

115. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 113.

116. *Id.* at 26-27.

117. *See id.* at 4.

118. *See id.* at 7.

119. MONT. DEP'T OF NATURAL RES. & CONSERVATION, ENVIRONMENTAL ASSESSMENT FOR UTILITY SOLUTIONS, LLC 1 (2010).

120. *Id.* at 2, 6.

121. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 113, at 16.

122. *Id.* at 4.

123. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 1.

124. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 1113, at 8.

Published by U. of Denver, Fall 2010

application. So on September 4, 2008, the town called in its experts and presented testimony regarding its proposed groundwater pumping application, and their plan for mitigating any adverse effects.[125]

After the hearing, the DNRC asked the applicant to submit additional explanation of the applicant's two years of analysis and reports since the initial application had been filed.[126] Then on December 9, 2008, DNRC issued a thirty-two-page Proposal for Decision denying the town's application, because the town had not shown compliance with all the statutory criteria for a new application.[127] DNRC again took submissions from the applicant that explained to the DNRC the perceived information gaps or inconsistencies in the now voluminous record, and held oral argument. On April 6, 2009, DNRC issued a Final Order denying Manhattan's application, despite the town's submissions.[128] The town promptly appealed to the district court.[129] In discussions facilitated by the senior water user objectors, the town and DNRC were able to agree to a remand for the submission of additional evidence to address the deficiencies identified in the agency's Final Order.[130]

DNRC held a second evidentiary hearing on the application on July 17, 2009, for the purpose of accepting additional evidence and testimony in support of the application. After additional briefing, DNRC issued an *Order for Clarification of Wastewater Returns to the Gallatin River* on October 22, 2009. The applicant then filed this additional clarification.[131] Ultimately, DNRC conditionally granted the town's application on essentially the same grounds as the settlement with the senior water users—a settlement that had been finalized 18 months earlier.[132]

At this point, the town of Manhattan was three and one-half years into the application process with DNRC, and over $100,000 in expert analyses and attorney fees—or nearly $1000 for every man, woman, and child in the town of Manhattan.[133] And it still wasn't over for the town.

125. *Id.* at 1.

126. *Id.*

127. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 27-34.

128. *See* Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 3. The Final Order's denial was based in part on the town's failure to prove that its groundwater use would not adversely affect groundwater users on the opposite side of the Gallatin River. During the application review process, the DNRC's hydrogeologist acknowledged that the Gallatin River was a hydraulic barrier to further groundwater effects, and had told Manhattan as part of the "correct and complete" finding that wells on the opposite side of the Gallatin did not need to be evaluated. Interview with Matthew Williams, Water Law Attorney, Williams & Jent, in Bozeman, Mont. (Sept. 21, 2010).

129. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 3.

130. *Id.* at 3-4.

131. *Id.* at 5.

132. *Id.* at 34-36.

133. Interview with Matthew Williams, *supra* note 128.. Mr. Williams ultimately stopped billing the town of Manhattan for the time he invested over the last twelve months because of the high transaction costs and the lack of final resolution for the

Published by U. of Denver, Fall 2010

The senior irrigation water that Manhattan was relying on to provide the mitigation water belonged to a nearby ditch company. At this point, the ditch company was reluctant to go through a change-of-use application process with DNRC, because they did not want to get bound up in the same kind procedural maze and scrutiny that the town of Manhattan went through.[134] So, four years after its initial application, it 's back to the drawing board for the town of Manhattan.

C. *BOSTWICK V. DNRC*—DOWN THE RABBIT HOLE ONE MORE TIME.

In late 2005, more than two years after the passage of HB 720 and nearly a year after DNRC 's adoption of rules implementing HB 720, another applicant in the Gallatin watershed embarked on an application process that revealed how little had changed since 2003. A developer, Bostwick Properties, filed an application for a new groundwater permit on a proposed residential and commercial development along the upper Gallatin River, near the ski resort town of Big Sky, Montana. The Lazy J South development proposed 99 homes and 40 businesses (with an estimated 27 acres of irrigation).

Little did the applicant know that it was embarking on a more than three-year odyssey that included DNRC 's termination of the application, a re-filing of the application, an eventual DNRC finding that the second application was correct and complete, the filing of public notice, the filing of objections,[135] the settlement of objections, the expiration of a the statutory 180-day deadline on DNRC to render a decision,[136] the applicant 's filing of a lawsuit for writ of mandamus to compel DNRC to act, DNRC 's subsequent denial of the application before a scheduled show-cause hearing, an order, on May 12, 2008, from the district court mandating DNRC to approve the applicant 's application,[137] and, in 2009, a Supreme Court decision.[138]

The district court focused its ruling on the term "correct and complete." After describing the statutory treatment of the term "correct and complete," the district court granted Bostwick 's motion for a writ of mandamus, and expressly ordered DNRC "to immediately issue the Water Use Permit determined by the agency to be correct and complete

---

town.

134. *Id.*

135. *See* Objections of Trout Unlimited & Mont. Dep't of Fish, Wildlife, and Parks to Application No. 41H 30025398 (on file with author).

136. *See* Act of May 5, 2003, ch. 574, §1, 2003 Mont. Laws 2409, 2409-410. This failure to meet statutory deadlines was not unique to the Bostwick case. *See* Application to Change Water Right by Vermillion Ranch, *supra* note 94, at 5, in which the agency took sixteen months to issue a decision after the close of the record. More recently the DNRC took ten months after the close of the record in Application No. 76F 30028985 to Change Water Right Claim No. 76F 98201-00 by Talan, Inc. (Mont. Dep't of Natural Res. & Conservation Feb. 26, 2010) (final order).

137. Bostwick Properties, Inc. v. Mont. Dep't of Natural Res. & Conservation, No. DV-07-917AX (Mont. May 12, 2008) (findings of fact, conclusions of law and writ of mandate and order).

138. *See* Bostwick Properties, Inc. v. Mont. Dep't of Natural Res. & Conservation, 2009 MT 181, 351 Mont. 26, 208 P.3d 868 (Mont. 2009) for a recitation of the procedural background of this case.

Published by U. of Denver, Fall 2010

in the form and in the amount as requested by Bostwick."[139] It is evident from the court's recitation of findings and conclusions that it took offense at what it saw as the DNRC's dilatory and arbitrary behavior.[140] The decision, however, failed to account for the settlement between the applicant and the objectors.

DNRC appealed the decision to the Supreme Court.[141] The Supreme Court held that DNRC had violated a clear legal duty with regard to the Lazy J South application, but that this legal duty was only to act within the statutory deadlines.[142] The appropriate remedy, the Court held, was to order the agency to make a determination on the permit application, not to require the agency to issue the permit.[143] The Court rejected Bostwick Properties' reasoning that once DNRC had accepted the application as correct and complete and the objections were resolved, that the agency was obligated to issue the permit.[144]

A concurring opinion joined by five of the Justices, agreed that once the application was correct and complete DNRC had only a clear legal duty to process the application—not to grant it—but its displeasure with DNRC's behavior was manifest. It found that "DNRC's actions are nothing less than arbitrary, if not outrageous."[145] The one dissenting opinion was equally disapproving, and echoed the district court's conviction that the "correct and complete" should have compelled approval in this case.[146] This case provides at least some judicial guidance, however ambivalent, as to the meaning of "correct and complete" in DNRC's application process. But, even as the Supreme Court was deliberating on Bostwick, the legislature, largely in response to the Bostwick district court decision, was working to address the recurring conflict attending DNRC's review process.

D. *HOHENLOHE V. MONTANA DNRC*—THE SHIFTING SANDS OF AGENCY

139. *Id.*, at 871.

140. *Id.* at 869. The court notes with emphasis the amount of time that passed after the filing of the second application, and compares the department's approval on a similar application in the same area, implying that the department's denial was arbitrary. In its conclusions of law, the court explicitly characterizes the DNRC actions as arbitrary at conclusions 64 and 65.

141. In addition, Trout Unlimited and the Association of Gallatin Agricultural Irrigators filed a brief as amicus curiae. *See* Brief of Amicus Curiae Montana Trout Unlimited and Association of Gallatin Agricultural Irrigators (on file with the author).

142. Bostwick, 208 P.3d at 874.

143. *Id.* at 873-74.

144. *Id.*

145. *Id.* at 875 (Rice, J., concurring) ("Apparently realizing that it was required to follow the law, and that a court would hold it accountable, DNRC magically kicked out a decision on Bostwick's application in just six days—*denying* it, of course, and advising Bostwick for the first time of DNRC's concerns about the application.").

146. *Id.* at 875-76 (Warner, J., dissenting) ("This parity of terms forces the conclusion that DNRC's initial designation of an application as correct and complete is substantive and indicates that the applicant has established a prima facie showing within 180 days from the date of publication, its initial designation of correct and complete must stand, and a district court may require by writ of mandate that DNRC issue the permit.").

Published by U. of Denver, Fall 2010

INTERPRETATION.

Montana is unique in the West in that it allows private entities such as Trout Unlimited to lease water rights for instream flow, and it allows a water right holder to simply convert a consumptive use right,[147] such as an irrigation right, to instream use for a term of years.[148] Between the creation of the pilot program in 1995 and the lifting of the sunset provision in 2005, DNRC approved 20 leases or conversions.[149] Since then, DNRC has approved a handful more.[150]

Since the passage of the pilot program in 1995, DNRC 's treatment of applications for changes to instream flow in some ways mirror the challenges described elsewhere in this article. Between 2001 and 2005, both the amount of documentation necessary to establish historic use,[151] and the time from filing to agency decision has increased.[152] And as illustrated by the case of *Hohenlohe v. Montana Department of Natural Resources and Conservation*, DNRC altered its interpretation of how much flow an instream change could protect below the historic point of diversion.[153] The leasing statutes require an applicant for an instream flow change to describe the stream reach in which flow will be maintained.[154] A key provision in the instream flow change statutes defines what water can be protected:

The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to

147. MONT. CODE ANN. § 85-2-408(2)(a) (2009).

148. *Id.* at § 85-2-408(2)(b) (2009); *see also* § 85-2-407(2), (9) (2009) (setting the maximum term for most temporary changes (including instream changes) at ten years, with a provisions of up to 30 years for changes that involve "a water conservation or storage project . . . .").

149. PRIVATE WATER LEASING, A MONTANA APPROACH, *supra* note 26, at 13.

150. Telephone Interview with Mike McLane, *supra* note 51. There are three entities in Montana that actively lease water rights for instream use: The DFWP, Trout Unlimited, and the Clark Fork Coalition (formerly Montana Water Trust). Telephone Interview with Barbara Hall, counsel for the Clark Fork Coal., former Executive Dir. for the Mont. Water Trust. Since 2005, the DNRC has not approved any leases to DFWP (two leases to Trout Unlimited; and nine leases to the Clark Fork Coalition).

151. *Compare* Authorization to Change Appropriation Water Right No. 76M-W015976-00 (the first private instream change approved in the state, a 1997 change on Rock Creek in the Nine Mile drainage, comprised six pages and seven exhibits), *with* Firehole Ranch Change Application for Water Right Claim No. 41F 125476 (a recently filed application of similar complexity to the Rock Creek lease, on Watkins Creek in the Madison River watershed, comprised an application of 14 pages and 16 exhibits).

152. *Compare* Authorization to Change Appropriation Water Right No. 76M-W015976-00 (1997 change on Rock Creek in the Nine Mile drainage, took less that six months from the filing of the application to its approval), *with* Application 76F-3004783 (TU filed a pending application on January, 2010; as of August 25, DNRC has 120 days to make a preliminary determination on the application).

153. Hohenlohe v. DNRC, Cause No. BDV-2008-750, at 1-3 (Mont. Dist. Ct. 2009).

154. MONT. CODE ANN. §§ 85-2-408(1)(a), 85-2-436(1) (2009).

Published by U. of Denver, Fall 2010

benefit the fishery resource below the existing point of diversion.[155]

The key language in section 408 is "the amount historically consumed." The question raised by "historically consumed" is what does it mean in the context of a reach that has been historically dried up, or at least severely de-watered by historic irrigation practices? The classic definition of "consumptive use" focuses on loss to plant use—evapotranspiration.[156] In 2005,prior to the application that gave rise to the *Hohenlohe* case, DNRC had approved an application in which Trout Unlimited sought to change to instream flow, a right that had historically been diverted from the stream and lost to the proposed reach of instream flow protection.[157] In the 2005 approval, DNRC authorized the protection instream of nearly the entire diverted amount, including the historic return flow that had re-entered the stream below the protected reach.[158] Trout Unlimited's rationale for requesting the protection of the return flow in an upstream reach was twofold: First, this return flow had not been historically available to other users within the reach protected and thus harmed no one; second, since instream flow is non-consumptive in nature, the historic return flow portion of the right would still be available to other downstream users relying on it. In the *Hohenlohe* case, the ground shifted.

Christian and Nora Hohenlohe own a ranch that has water rights to Little Prickly Pear Creek, a tributary to the Missouri River. The Hohenlohe's predecessor in interest had historically flood irrigated land adjacent to the stream, diverting as much as 32 cubic feet per second (cfs), which could be the entire flow at mid-summer. The Hohenlohes, in cooperation with the DFWP, converted their irrigation from flood to sprinkler, and continued to irrigate the same ground that they had historically irrigated.[159] The installation of the sprinkler enabled them to reduce their diversion from Prickly Pear Creek to a maximum of 3.5 cfs.

Once the Hohenlohes installed the sprinkler, they retained a water rights consultant and filed an application with DNRC to protect the water they were no longer diverting for fisheries in the reach below the historic point of diversion.[160] After protracted correspondence between

155. *Id.* at § 85-2-408(7); *see also* § 85-2-436(3)(a) (enabling DFWP instream leases).

156. *See, e.g.*, MONT. ADMIN. R. 36.12.101(15) (2009) ("'Consumptive use' means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.").

157. Change Authorization 76F-30011112 (Dep't. Natural Res. & Conservation, Apr. 18, 2005) (final auth.).

158. *See e.g., Id.* (showing Trout Unlimited's ability to demonstrate that most or all of the water historically diverted was lost to the reach proposed for protection, and the DNRC authorized a protected flow and volume reflecting that loss).

159. MONT. CODE ANN. 85-2-102(6) (2009), (defining "change in appropriation". The Hohenlohes were not required to seek DNRC approval for the switch to a sprinkler as long as they did not change the irrigated footprint. Because, a "change in appropriation" does not include a change in method of irrigation. It only includes a change in purpose, place of use, or point of diversion).

160. Hohenlohe v. DNRC, No. BDV-2008-750, at *1-3 (Mont. Dist. Ct. 2009) (on file

Published by U. of Denver, Fall 2010

the consultant and DNRC, and field visits to the site, DNRC determined that the application was correct and complete, and issued a public notice.[161] DNRC received one objection that was later withdrawn.[162] Subsequently the regional office denied the application based on its finding that the application failed to prove the change criteria under section 402.[163] The Hohenlohes requested a hearing, and DNRC appointed as hearings officer the regional manager who had initially issued the denial. The manager denied the Hohenlohe's request to disqualify himself.[164] In July, 2008, after further hearing, DNRC confirmed the regional office denial. DNRC's order listed a number of grounds for denial:

The applicant failed to prove that the change in return flows would not adversely affect any other water rights on the stream;[165]

The historic claimed volume was excessive; [166]

The applicant had failed to prove that there was any water salvaged because there was no reduction in irrigated acres.[167]

The Hohenlohes filed a petition for judicial review in district court in August, 2008, challenging both the substance of the opinion and the process by which the hearings officer reviewed his own decision.[168] Trout Unlimited and the Montana Water Trust sought and were granted permission to participate as amici curiae on the sole question of whether DNRC's new interpretation of section 85-2-408(7) of Montana Code, relating to the amount of water that could be protected below the historic point of diversion, was correct.[169]

---

with author).

161. *Id.* at 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. Application No 41QJ30013407 to Change Water Right Claims nos. 41QJ 7073 and 41QJ 7074, at *16 (Dep't Natural Res. & Conservation Jul. 8, 2008) (final order). In addition, the department asserted that the applicant failed to show that there would be no adverse effect on downstream users from the change in return flow regime. Specifically, the DNRC noted that there was one downstream user on Little Prickly Pear Creek that the applicants did not address (the objector with whom the applicants settled) and that the applicants did not address the potential adverse effects on water users on the Missouri River, which appeared to be the recipient of the return flow.

166. *Id.* at *15. At the heart of this finding was DNRC's conviction that the claimed historically diverted volume was excessive, and therefore constituted waste that exceeded the amount historically necessary for beneficial use. The department actually calculated what it determined to be a reasonable diverted volume, but declined to offer any conditions for approval that would reflect the lower volume.

167. *Id.* at *17. This goes to the issue of "amount protected" below the historic point of diversion in 85-2-408(7). The Department was arguing, in effect, that if irrigated acreage was not reduced, then there was no loss of evapotranspiration, and therefore nothing to be protected below the historic point of diversion. This marked a radical departure from the DNRC's earlier interpretation of 85-2-408(7). Manhattan, *supra* note 113, at 3.

168. *See* Petition For Judicial Review, Hohenlohe v. DNRC, No. BDV 2008-750, *3 (Mont. Dist. Ct. 2009) (on file with the author).

169. *See* Brief of Amici Trout Unlimited and the Montana Water Trust at 1-2, Hohenlohe v. DNRC, No. BDV 2008-750 (Mont. Dist. Ct. 2009) (on file with the

Published by U. of Denver, Fall 2010

In June 2009 the district court ruled in favor of the Hohenlohe's application, remanding the application back to DNRC with instructions to "summarily" grant the application.[170] In the opinion accompanying the order, the court dismissed DNRC's findings on return flows, brushed aside the DNRC findings on the historic volume diverted, and overturned the DNRC's construction of section 408 that reversed its previous position that water lost to the protected reach but not lost to evapotranspiration could be salvaged and applied to the beneficial use of fisheries.[171] DNRC appealed the district court decision, challenging the district court's findings as to the historic volume diverted and return flow, but expressly declining to challenge the court's ruling on the construction of section 408.[172] On September 21, 2010, the Supreme Court issued its opinion.[173]

First, notwithstanding the decision of DNRC to accept the district court opinion as to section 85-2-408(7), the court firmly, and extensively upheld the lower court ruling that an instream lease could protect up to the entire amount diverted below the headgate in certain circumstances.[174] In so doing, it noted, with disapproval that the DNRC decision in the Hohenlohe application represented a deviation from past practice.[175]

On other issues of procedure and proof, the court was equally explicit. First, it specifically described the "preponderance of the evidence" standard in section 802 of the Montana Code as "the relatively modest standard that the statutory criteria are 'more probable than not' to have been met."[176] It also held that section 408(7) did not impose an additional requirement of proof upon applicants.[177] Further, the Supreme Court took DNRC to task for abusing its discretion in its

author) (noting a key part of the TU/MWT argument was that the DNRC's interpretation marked a radical departure from its earlier interpretation as embodied in the approval of changes granted to both TU and MWT).

170. *See* Hohenlohe v. DNRC No. BDV 2008-750 at *11 (Mont. Dist. Ct. 2009) (on file with the author).

171. *Id.* at *7-11.

172. *See* Opening Brief for Appellant at 9, Hohenlohe v. DNRC No. BDV 2008-750 (Mont. Dist. Ct. 2009) (on file with author).

173. Hohenlohe v. State of Montana, Department of Natural Resources and Conservation, 240 P.3d 628 (Mont. 2010).

174. *Id.* at 641 ("We recognize, however, that the Department's own past interpretation of the phrase 'amount historically consumed,' as contemplated by § 85-2-408(7), MCA, reflects the reality that under some circumstances the diverted amount and consumed amount will be the same. These circumstances likely will arise in situations where no water historically had returned to the protected reach, and no downstream users likely would be affected adversely.").

175. *Id.* at 635 ("The Department deviated from its own prior interpretation of § 85-2-408(7), MCA, in denying Hohenlohes' application. *See e.g., Authorization Nos. 76F-30023056, Mannix Lease* (2007), and *76F-30011112, Hoxworth Lease* (2005). Moreover, the Department has conflated the subsection (7) consumptive use language with the showing of no adverse effect required by §§ 85-2-402(2) and -408(3), MCA.").

176. *Id.* at 634.

177. *Id.* at 634 ("The Department may not refuse to grant a change of use solely on the ground that the applicant failed to "prove" the limitation articulated by the applicant.").

Published by U. of Denver, Fall 2010

review of instream flow change applications.[178] While it reversed the district court's order on the narrow issue that it directed the department to "summarily" grant the application, it made it clear that the department's review should comport with the letter of its pronouncements.[179] Finally, it closed with a pointed slap at the department's length of review, citing the *Bostwick* case and pointedly directing DNRC to "comply with all applicable statutory procedures."[180]

One concurring opinion, by Justice Wheat, offered some specific constructive criticism to DNRC. In short, he suggested that it would serve all concerned—applicants, objectors, and DNRC alike—if the department were more open and forthcoming in its dealings with it sister agency the Department of Fish, Wildlife, and Parks, and with the applicant. Specifically, it chided DNRC for (1) not coordinating with the Department of Fish, Wildlife, and Parks,[181] (2) not disclosing to the applicant the information that its experts gathered and that could have supplemented the record,.[182] and (3) finally for being so tone-deaf as to appoint as hearing examiner the original decision-maker, legal though

178. *Id.* at 639 ("We agree as a general matter that the Department possesses the discretion to require return flow analysis to the extent necessary to determine lack of adverse effect. We are troubled, however, by the Department's failure to use its discretion in a consistent manner so as to provide instream flow change applicants with sufficient guidance as to the factual circumstances that will correlate with a given level of analysis. . . The analysis will vary from one application and accompanying set of facts to the next. This inherent variability does not mean that the Department may act with impunity according to its own whims and without regard for the facts of a case or the underlying purpose and intent of the statute that it is empowered to uphold.").

179. *Id.* at 641("We deem it appropriate under the circumstances to reverse the District Court's order that directed the Department to grant summarily Hohenlohes' change of use application for the full diverted amount. The District Court's order sweeps too broadly and casts aside entirely the Department's discretion granted by § 85-2-408(7), MCA, to limit under appropriate circumstances the amount of water that a change of use applicant may dedicate to instream flow. The Department should evaluate in the first instance Hohenlohes' change of use application consistent with the principles set forth here.").

180. *Id.* ("In evaluating Hohenlohes' application, the Department further must comply with all applicable statutory procedures. For example, the Department issued its final order denying Hohenlohes' application 742 days after the objection deadline had passed. Section 85-2-310(1), MCA (2007). This same type of dilatory response prompted the Eighteenth Judicial District Court, Gallatin County, to grant the applicants a writ of mandate in *Bostwick*. . . The Department cites *Bostwick*, however, for the proposition that this Court may not overturn its discretionary act in refusing to grant Hohenlohes' change of use application. The Department reads a level of administrative immunity into *Bostwick* that does not exist in statute or case law. We in no way intended to condone the Department's procedural deficiencies.").

181. *Id.* at 642.

182. *Id.* at 643 (Justice Wheat was pointed in his suggestion: "[i]nstead, the Department denied Hohenlohes' application for failure to meet their burden to prove lack of adverse effect, the extent of historic use, and historic consumption—all while the Department itself had data that it could have contributed to the record. The Department's actions with respect to this issue disregard the public policy mandate that the State 'shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.' Section 85-1-101(3), MCA. The Department's adversarial approach does not further the goal that all water resources of the State be put to optimum beneficial use.").

Published by U. of Denver, Fall 2010

it may have been.[183]

E. MONTANA'S CHANGE OF WATER RIGHT PROCESS UNDER HOUSE BILL 40.

After the District Court ruled against DNRC in the *Bostwick* case, but before the Supreme Court decision in that case, the 2009 Montana Legislature passed House Bill 40. The impetus for House Bill 40 was partly in response to the "correct and complete" issues litigated in the *Bostwick* case,[184] partly because of dissatisfaction with DNRC's review of proposed new groundwater developments under the recently passed HB 831,[185] and, partly to provide some clarity to a process that, as evidenced by *Bostwick* and *Hohenlohe*, had grown increasingly unpredictable.[186] House Bill 40 purported to address all of these infirmities in the review process. Specifically, HB 40:

Modified the definition of "correct and complete" by describing it as the documentation necessary for the "department to begin evaluating the information."[187]

Required DNRC to issue a preliminary decision to grant or deny the application and allows for informal communication between DNRC, applicants, and potential objectors within a 120-day period after a correct and complete determination.[188]

If DNRC preliminarily denies the application, the applicant may request a show cause hearing with a *different* examiner than the regional manager who issued the denial.[189]

If the DNRC preliminarily grants the application, the public is given notice and a contested case hearing is held if anyone should object to the application.[190]

Once a matter has been heard and briefed on contested case, DNRC must issue a decision within ninety days after the administrative record has closed.[191]

---

183. *Id.* ("Third, I recognize that under then-existing law, the Department was not required to appoint a new hearing examiner. That being said, the Department's obstinate approach to this issue lacks common sense and courtesy. It gives the impression that the Department did anything it could to avoid giving Hohenlohes a fair shake. Once again, the Department's actions paint it as an adversary that is not interested in effecting full utilization, conservation, and protection of Montana's water resources. The Department's obstinance in this case was both unfortunate and unnecessary.").

184. *Hearing on House Bill 40 Before the H. Natural Res. Comm.* 2009 Leg., 61st Sess. 4 (Mont. 2009) (Testimony of John Tubbs, Division Adm.,' Water Res. Div., Mont. DNRC).

185. *Id.* (Testimony of Dustin Stewart, Exec. Dir., Mont. Bldg. Indus. Ass'n).

186. *Id.* at 4. *See also* testimony of David Schmidt, Water Rights Solutions, Inc. In his testimony, Mr. Schmidt criticizes the DNRC for what he describes as shifting criteria and includes correspondence with the DNRC that he asserts exemplifies "the shifting sands of DNRC policy."

187. *See* MONT. CODE ANN. § 85-2-102(8) (2009).

188. *See id.* at § 85-2-307(2).

189. *See id.* at § 85-2-310(1)(b).

190. *See id.* at § 85-2-307(2)(b).

191. *See id.* at § 85-2-310(5). Prior to the 2009 amendments the deadline was 180

Published by U. of Denver, Fall 2010

F. REVIEW OF CHANGES OF APPROPRIATION IN A POST-HOUSE-BILL-40 WORLD.

House Bill 40 addresses a number of the common complaints of the past. The most contentious of those include: (1) length of time between filing and DNRC decision; (2) a moving target of policy and legal interpretation; and (3) perceptions of fairness in agency deliberations.[192]

DNRC has taken some action in response to the mandates in House Bill 40. Perhaps the most notable of these actions has been the development of a "preliminary decision" template for reviewers to use in announcing a preliminary decision on a proposed application.[193] The Department appears to have derived the template from the form previously used to announce a decision in which there has been a hearing on the application.[194] The format of the template is somewhat of a checklist approach, and if followed should provide a relatively clear path to the DNRC's reasoning behind the preliminary decision.[195] DNRC anticipates that the Preliminary Determination Change Template will assist its staff in providing sound and consistent review of the change process under the HB 40 structure.

In addition to the internal guidance implied in the development of the Preliminary Determination Change Template, DNRC initiated a series of workshops held at various locations around the state in 2009 to explain to the public how to complete DNRC's change and new permit applications.[196] Unfortunately, some have characterized the substance of these workshops as superficial and not particularly helpful in describing the level of documentation that DNRC needs for its review.[197]

After House Bill 40, the Change Review process, at least on paper, progresses as follows:

The applicant files an application; DNRC must notify the applicant of any deficiencies in the application within 180 days;[198]

The applicant has ninety days to address the deficiencies that the

---

days.

192. *See* DNRC WATER RESOURCES DIVISION STRATEGIC PLAN 2005-2010, *supra* note 111.

193. Draft Template for Preliminary Determination to Grant Change (July 16, 2009) (on file with the Dep't of Natural Res. and Conservation).

194. *See* Application No. 41QJ-30013407 to Change Water Right Claim Nos. 41QJ-17073-00 and 41Q17074-00 by Christian C. and Nora R. Hohenlohe (Dep't of Natural Res. and Conservation, Jul. 28, 2008) (on file with DNRC) (final order) (exemplifying the style prior to House Bill 40); *compare* Draft Template for Preliminary Determination, *supra* note 190 (template of forms under the new rules).

195. *See* Draft Template for Preliminary Determination, *supra* note 193.

196. Interview with Patrick Byorth, Staff Attorney, Trout Unlimited Mont. Water Project, in Bozeman, Mont. (Sept. 17, 2010).

197. *Id.*; Interview with Barbara Hall, *supra* note 150.

198. MONT. CODE ANN. § 85-2-302(5) (2009); Application No. 76F-30028985 to Change Water Right Claim No. 76F 98201-00 by Talan, Inc., Final Order (Dep't of Natural Res. and Conservation, Feb. 26, 2010) (on file with DNRC) (illustrating that the application Trout Unlimited filed under the terms of HB 40 has progressed well, as DNRC sent a deficiency letter well within the 180 day time limit).

Published by U. of Denver, Fall 2010

department identified;[199]

Upon receipt of the applicant's corrections, the department has an indeterminate amount of time to determine if the application is correct and complete;[200]

Once the department has determined that an application is correct and complete, DNRC has 120 days to make a preliminary determination as to whether the application meets the criteria, during which time the DNRC may meet with the applicant; if the preliminary determination is for approval, the application goes to public notice;[201]

Persons have from fifteen days up to sixty days to file objections;[202]

If an application goes to hearing, the DNRC has ninety days to issue a decision once the administrative record is closed.[203]

DNRC staff does not appear to be of one mind about the ability to meet new deadlines.[204] Some staff members are confident of meeting the deadlines;[205] however, others suggest that the levels of staffing may significantly affect the agency's ability to meet the statutory deadlines.[206]

Given that it became law a little over a year ago, it may still be too early to tell if House Bill 40 has had its desired effect; early indications seem to be mixed. On one hand, a tabulation of applications filed under House Bill 40 shows that between July 2009, and July 13, 2010, of the thirty-two change applications filed, DNRC had approved only one.[207] DNRC terminated seven applications without going to notice, and gave two others preliminary determinations for approval, which did

---

199. MONT. CODE ANN. § 85-2-302(6) (2009).

200. *See* MONT. CODE ANN. §§ 85-2-302, -307 (2009).

201. *See id.* at. § 85-2-307 (2009); *see* Interview with Kerri Strasheim, Bozeman Reg'l Manager, Dep't of Natural Res. and Conservation, in Bozeman, Mont. (July 23, 2010) (describing process of how, once a regional manager issues a preliminary decision to grant or deny the proposed changes, the New Appropriations Program staff ["central office" composed of two to three resource specialists] reviews the application for quality control and consistency insurance); *see* Interview with Andy Brummond, *supra* note 81 (explaining how the central office review, a relatively recent practice, has become a source of contention for applicants, because the central office may override the recommendations of the regional staff after months of discussion between this staff and the applicant, a process which underscores the applicants' perception of DNRC's arbitrariness).

202. MONT. CODE ANN. § 85-2-307 (2009).

203. *Id.* at. § 85-2-310(5) (2009); *see also* In The Matter of Application No. 76F-30028985, *supra* note 198 (discussing the DNRC took nearly seven months to issue a final decision in Trout Unlimited's only contested case proceeding completed since enactment of HB 40).

204. Interview with Kathy Arndt, Water Res. Specialist, Dep't of Natural Res. and Conservation, Helena Reg'l Office, in Helena, Mont. (Sept. 13, 2010); *see* Interview with Kerri Strashheim, *supra* note 201.

205. *Id.*

206. Interview with Kathy Arndt, *supra* note 204.

207. *See* Telephone Interview with Mike McLane, *supra* note 51, (describing that the one application that did receive approval, application no. 30047599-76M, completed the process in just over six months); *see* E-Mail from Barbara Hall, Legal Director, Clark Fork Coal., to Stan Bradshaw, Counsel, Mont. Water Project (Sept. 16, 2010) (on file with author) (providing data on change applications).

Published by U. of Denver, Fall 2010

go to public notice.[208] Thus, it is difficult to conclude much from this sample about the timeliness of review.

A review of the change processes in two other states, Washington and Colorado, indicates that these states have grappled with many of the same challenges that Montana has; namely, timeliness, transparency of the change criteria, and the accessibility of the process.[209] While the central goal of each state's process is the same as Montana's—to protect other water users from injury that could arise from a proposed change—each state approaches the task differently.[210] The examination of the change process in these states may provide some insight into other opportunities for Montana to improve its change process.

V. WASHINGTON'S CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS.

A. SUMMARY OF WASHINGTON STATUTORY STRUCTURE.

Washington has already allocated much of its water for use, so the state allows individuals to change elements of existing water right permits, certificates, or claims in order to adjust to new water needs.[211] To approve a water right change, Washington's Department of Ecology (DOE) "must find that three criteria have been satisfied; (1) that the applicant holds valid water rights; (2) that the proposed change will be for a beneficial use; and, (3) that the change will not result in any adverse impact on existing rights."[212] One statute authorizes Washington's change of water right process[213] and a wealth of opinions issued by the Pollution Control Hearings Board further guides the process[214]. Washington's change statute, unlike Montana's, explicitly

208. *See* Telephone Interview with Mike McLane, *supra* note 51; *see also* E-Mail from Barbara Hall to Stan Bradshaw, *supra* note 207.

209. James S. Witwer and P. Andrew Jones, *Statutory and Rule Changes to Water Court Practice*, 38 COLO. LAW. 53 (2009); *see also* Telephone Interview with Robert Barwin, Envtl. Eng'r, Wash. Dep't of Ecology Water Res. Program (July 15, 2010); *see also* Telephone Interview with Aaron Penvose, Project Manager, Wash. Water Project, Trout Unlimited (July 23, 2010).

210. *See* WASH. REV. CODE § 90-03-380 (2010) (example of difference in Washington's approach); *see* Mark Honhart, *Carrots for Conservation: Oregon's Water Conservation Statute Offers Incentives to Invest in Efficiency,* 66 U. COLO. L. REV. 827, 838 (1995) (illustrating the different approaches taken in states such as Colorado towards water law issues).

211. SMITH, P., STATE OF WASH., DEP'T OF ECOLOGY, *Changing or Transferring an Existing Water Right, in* WATER RESOURCES PROGRAM, PUB NO. 98-1802-WR (2008); *See generally* STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1200 (1999) ("'Change' means a modification or combination of modifications, in whole or in part, of the point of diversion or withdrawal, purpose of use, or a transfer of water right, or other limitation or circumstance of water use.").

212. Knight v. State, Pollution Control Hearings Bd., Nos. 94-61, 94-77, 94-80 (1995), *aff'd*, 137 Wash.2d 118 (Wash. 1999).

213. WASH. REV. CODE § 90.03.380 (2008) (authorizing the Department of Ecology to approve applications for a change or transfer of existing water rights).

214. State of Wash., *Pollution Control Hearings Board*, ENVTL. HEARINGS OFF., http://www.eho.wa.gov/Boards_PCHB.aspx (last updated 2008) (explaining that the Pollution Control Hearings Board is the administrative body which hears appeals

Published by U. of Denver, Fall 2010

states that a change may be permitted if there is "no increase in annual consumptive use."[215] In addition, change applicants in Washington are not faced with the challenge of estimating consumptive use that occurred forty or more years in the past.[216] While DOE[217] has not developed additional administrative rules to govern change applications, the agency's Water Resources Program Policies, provide highly accessible guidance for agency reviewers.[218]

The following summarizes Washington's change of water right application and review process:[219]

An applicant files an application to change a water right by one of three methods: (a) apply directly to Ecology, (b) apply to a local Water Conservancy Board, or (c) enter into a Cost Reimbursement Contract with Ecology.[220]

Ecology reviews the application for completeness and informs the applicant of any informational deficiencies.[221]

Once it has finished the completeness review and the applicant has remedied any deficiencies, Ecology sends a Legal Notice of Application to the applicant.[222] The applicant then publishes information of the proposed change for two weeks, notifying the public of its thirty-day objection period.[223]

At the end of the objection period, Ecology initiates a tentative review of the water right's extent and validity,[224] and that of any potentially impaired rights.[225] Ecology notifies the applicant if

---

from orders and decisions of the Department of Ecology and other agencies as provided by law, and consists of three governor-appointed members).

215. WASH. REV. CODE § 90.03.380 (1) ("[A]nnual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.").

216. *Id.*

217. WASH. REV. CODE § 43.21A.020 (2010) (creating Washington Department of Ecology is the administrative agency and authorizing Ecology to govern the state water rights and management programs).

218. Telephone Interview with Robert Barwin, *supra* note 209.

219. WASH. REV. CODE § 90.03.380. *See generally* Smith, *supra* note 211 (explaining that the process varies slightly depending on the type of water instrument proposed for change—a perfected water certificate, a water right permit, or a water right claim).

220. Smith, *supra* note 211211; *see generally* STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM, ECY 040-1-97, APPLICATION FOR CHANGE/TRANSFER OF WATER RIGHT (2008) (demonstrating the application process).

221. *Compare* Smith, *supra* note 211, *with* MONT. CODE ANN. § 85-2-102(6) (requiring that all information submitted be "correct and complete").

222. Smith, *supra* note 211.

223. *Id.*

224. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1120 (2004) (defining a tentative determination as the Water Conservancy Board's or Ecology's finding of the amount of water perfected and beneficially used under a water right that has not been abandoned or relinquished).

225. WASH. REV. CODE § 90.03.380 (noting that a transferred water right or change in point of diversion may be granted only to the extent that water right was historically put to beneficial use); Okanogan Wilderness League, Inc. v. Twisp, 133 Wash. 2d 769, 777, 781 (Wash. 1997) (explaining that in deciding whether to approve

Published by U. of Denver, Fall 2010

additional information is needed to proceed.[226]

Ecology staff and unit supervisors summarize the investigations in a Report of Examination (ROE) which contains a recommendation to deny or grant the change.[227] The ROE is then put before an Ecology section manager who, if approves, issues either a final ROE, or an Order approving the ROE which may contain specific, *reasonable* conditions for the change approval.[228]

The applicant or any member of the public may appeal Ecology's decision to the Pollution Control Hearings Board (PCHB) within thirty days, with the burden of proof falling on the appellant to prove Ecology is in error.[229] PCHB may affirm, deny or modify Ecology's decision.[230]

If Ecology approves a change to a water right *permit*, it will issue a Superseding Permit with a set development schedule for the change completion.[231] If applying to change to a *claim* or *certificate*, the applicant may request an extension in order to develop a three-phase project completion plan.[232] After the applicant completes the construction and submits the proper forms,[233] Ecology collects fees and conducts a Proof of Examination before issuing the final certificate.[234]

B. THE APPLICANT'S BURDEN IN WASHINGTON STATE.

In Montana, the burden remains with the applicant throughout the change review process to prove that the proposed change meets the criteria.[235] While the two processes require similar findings, much of what would be the applicant's burden in Montana is ultimately the agency's responsibility in Washington.[236]

---

a change under RCW 90.03.380, Ecology must tentatively determine "the existence and extent of the beneficial use of a water right").

226. Smith, *supra* note 211; *see generally* Telephone Interview with Robert Barwin, *supra* note 209 (explaining that for most applicants, the "extent and validity review" is the most onerous part of the process); *see also* Telephone Interview with Aaron Penvose, *supra* note 209.

227. Smith, *supra* note 211.

228. *Id.*; Merritt v. State, Pollution Control Hearings Bd., Nos. 98-140, 98-202, 98-272, 98-273 (1999) (holding that Ecology has the authority to impose reasonable conditions when granting an order, and the imposition of a condition does not transform the certificate into a permit to develop new water); *see also* Telephone Interview with Aaron Penvose *supra* note 209 ("[Ecology] conditions most rights now. [Frequently, changes are] conditioned on an instream flow rule, which most basins have now.").

229. Smith, *supra* note 211; Knight v. State, Pollution Control Hearings Bd., Nos. 94-61, 94-77, 94-80 (1995), *aff'd*, 137 Wash.2d 118 (Wash. 1999).

230. Smith, *supra* note 211.

231. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1280 (2009).

232. *Id.*

233. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, Form ECY 040-74 (2008).

234. Smith, *supra* note 211.

235. *In re* Application of Change of Water Rights No. 101960-41S and 101967-41S by Keith and Alice Royston, 816 P.2d 1054, 1057 (Mont. 1991).

236. "The right to the use of water which has been applied to a beneficial use [Ecology must make a tentative determination of extent and validity of the right] in

Published by U. of Denver, Fall 2010

In Washington, an applicant must complete an Application for Change or Transfer of a Water Right for each right or claim subject to change. The form requires the applicant to describe the right and the proposed changes, including: the point of diversion, purpose of use, timing and rate of use, and an aerial map depicting the place of use.[237] With the applicant's information in hand, Ecology bears the ultimate burden of calculating the extent of historic use.[238] Similarly, Ecology bears the burden to show that the change will not impair existing water rights.[239]

C. WASHINGTON STATE'S CHANGE OF WATER RIGHT APPLICATION STATISTICS.

Ecology processes change of water right applications at an average of eight to nine months at minimum and an indeterminate amount of time at maximum.[240] Aside from the timelines to respond to Water Conservancy Board recommendations, Ecology decision-making is not subject to any deadlines. The lack of temporal pressure on the agency is likely a central contributor to Washington's sizeable backlog of change applications, which currently sits at around one thousand.[241]

---

the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights [Ecology must then make an impairment determination]." WASH. REV. CODE Ann. 90.03.380(1) (West 2010); *see also* R.D. Merril Co. v. State Pollution Control Hearings Bd., 969 P.2d 458, 463 (Wash. 1999) (When the Department of Ecology is asked, under Wash. Rev. Code 90.03.380, to approve a requested change in the point of diversion or use made of a previously perfected water right, or to approve a transfer of the right to another, the department must tentatively determine the extent to which the right continues to be applied to a beneficial use; i.e., the Department must preliminarily quantify the right and determine if the right has been abandoned or relinquished in whole or in part.).

237. Application for Change or Transfer of Water Right, Form ECY 040-1-97, Department of Ecology, State of Washington (an applicant should present any information depicting the owner's historic use of the water right—such as electric bills for a pumping station, receipt for purchase of water system equipment, dated aerial photographs, and affidavit(s) of person familiar with the water right—then may work with the permit writer to reconcile any remaining concerns or discrepancies). *See also,* Penvose, *supra* note 209.

238. To compute the consumptive use of the water right, Ecology prefers meter record data, but will also accept calculations taken by pump, motor, sprinkler layout and nozzle delivery. *See* ELWIN A. ROSS & LELAND A. HARDY, NATURAL RESOURCES CONSERVATION SERVICE, NATIONAL ENGINEERING HANDBOOK, PART 652, IRRIGATION GUIDE 7-9, 7-10 (1997), *available at* http://www.wa.nrcs.usda.gov/technical/ENG/irrigation_guide/index.html (Sept. 2, 2007)*; see also* Penvose, *supra* note 209.

239. *See* WASH. REV. CODE ANN. 90.03.380(2) (West 2010). At this stage, Ecology must make tentative determinations of the extent and validity of any other water rights that could be impaired by the proposed change. Ecology requires applicants to obtain signatures from adjacent property owners within the described place of use. While this requirement may speed the process by putting potential objectors on early notice, the extent and validity review remains one of the more complex, time-consuming stages of the change review. Penvose, *supra* note209.

240. Barwin, *supra* note 209.

241. Penvose, *supra* note 209; Barwin, *supra* note 209218.

Published by U. of Denver, Fall 2010

Experts further attribute the backlog to Ecology's burden to produce the required evidentiary showings. "Insufficient information does not equate to the denial of an application, therefore, coupled with an insufficient budget to gather all the necessary information or, alternatively, political support for Ecology to place that burden on applicants, we have a large backlog."[242]

D. INTERNAL AGENCY GUIDANCE ON PROCESS IMPLEMENTATION.

Most of the intra-agency training occurs on the job (e.g., periodic internal instructional lectures on particular topics held by the senior staff).[243] The Department of Ecology also compiled an extensive collection of guidance documents "to guide and ensure consistency among water resources program staff in the administration of laws and regulations."[244] Ecology produced the Water Resources Program Policies and Procedures using agency staff management teams and by incorporating public comment (however, the policies are not formal rules passed through the full APA rulemaking process).[245] These policies and procedures inform how the Department of Ecology applies case law along with the explicit statutes. They are the "meat" of the agency's accountability.[246]

Ecology posted the Water Resources Program Policies and Procedures on its website in a user-friendly format to assist applicants in managing their water rights and to publicize agency rationale.[247] Although Ecology is not statutorily required to post draft reports of examinations relating to new water right and change applications, the agency elected to open them to a 30-day public review.

> Public notice of applications is a key procedural element of the permit application process intended to protect the rights of existing water right holders, and ensure that interests of other citizens are considered during evaluation of applications. . . .
>
> One of the Water Resources Program's (WRP) goals is to improve both the quality and consistency of decisions made in response to applications for new permits and changes to existing water rights. In recent years, the WRP has made efforts to improve its training program for staff assigned to review applications and recommend approval or denial of applications for permits and changes or

242. Telephone Interview with Robert Barwin *supra* note 209 (discussing Black Star Ranch v Ecology, 63 Wash. App. 1045 (1992) (unpublished) (Ecology must have sufficient information to make affirmative findings to approve or deny an application), and Andrews v. Ecology, PCHB No. 97-20 (1997) (Where incomplete information exists to determine whether the existing rights of others would be impaired, a change cannot be granted.)).

243. Barwin, *supra* note 209.

244. Washington Department of Ecology, *Water Resource Program Policies and Procedures* http://www.ecy.wa.gov/programs/wr/rules/pol_pro.html.

245. Barwin, *supra* note 215.

246. *Id.*

247. *Id.*

Published by U. of Denver, Fall 2010

> transfers. Part of the effort includes improving the tools the staff and decision makers rely on. Another part is development of clear guidance and policy to facilitate more consistent decisions.
>
> Improved quality and consistency can be achieved by intensifying the program's efforts to ensure that reports of examination are factually correct.[248]

Ecology's additional notice and comment period thus promotes more accurate record-building, earlier dispute-resolution, and more transparent agency action.

VI. COLORADO CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS

In light of Colorado's longstanding water scarcity challenges, the state's process for changing a water right may provide Montana with a useful context in which to consider the realities of twenty-first century water management.[249] "With less water available for appropriation to begin with, Colorado legislators may be more concerned with protecting existing water rights than in creating new water rights."[250] While most of the Northwest and Rocky Mountain states face increasing water demands on fully or over-allocated basins, Colorado must not only cope with an exploding population, also allot water for its four neighboring states and perpetrate multiple, expensive trans-mountain diversions.

Colorado's change process reflects the magnitude of its water scarcity pressures in two important ways. First, the process is well developed. Colorado has recognized the right to change water rights since 1899 and has applied a highly structured judicial approach to its application process since 1969.[251] Since the principle of "maximum utilization" or "optimum use" still prevails in water management decision-making, courts are more willing to grant changes subject to

248. Internet Posting of Reports of Examination by Ken Slattery, *Water Resources Program Policy: POL-1005*, WASHINGTON STATE DEPARTMENT OF ECOLOGY (Jan. 1, 2007), http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1005.pdf

249. *See* Mark Honhart, *Carrots for Conservation: Oregon's Water Conservation Statute offers Incentive to Invest in Efficiency.* 66 U. COLO. L. REV. 827, 841 (1995) ("Montana's three largest watersheds carry more than three times the water Colorado's largest rivers carry. Oregon's [similar to Washington's] rivers carry more than ten times Colorado's river volumes.").

250. *Id.*

251. *See* An Act in Relation to Irrigation, ch. 185, 1899 Colo. Sess. Laws 235 (The statute originally allowed changing only a water right's point of diversion.); Adjudication Act of 1943, ch. 190, 1943 Colo. Sess. Laws 613 (codified as amended at COLO. REV. STAT. § 148-9-22 (1963)); COLO. REV. STAT. §§ 148-149 (1963) (decreed the changes of the points of diversion consistent with the usage over the previous years); Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. § 37-92-101 (2010) (defined "change of water right," established water right adjudication process, integrated ground and surface water management, etc.); *see* COLO R. CIV. P. 90(e)-(f) (amendments setting timelines by which water judges and referees must issue decisions for applications to change water rights).

Published by U. of Denver, Fall 2010

modifications or conditions rather than deny an entire application.[252]

Second, the process is generally predictable. While the applicant's evidentiary burdens are high and often expensive, water judges and referees apply statutory and Water Court Rules strictly and consistently. Numerous factors may contribute to this uniformity, but perhaps the most important factor has been the development of a clear line of precedent arising from the judicially-driven change process.[253]

A. COLORADO'S WATER COURT SYSTEM.

Unique in the West, Colorado manages its water rights using a judicially-supervised system, rather than agency permitting.[254] Water courts, staffed by water judges, referees, and clerks, adjudicate all water matters within the state's seven districts—each district covering a major river basin.[255] The court hears each application to change a water right in a separate litigation process, subject to the Water Rights Determination and Administration Act of 1969, Colorado's Rules of Civil Procedure (C.R.C.P.), the Water Court Rules (Uniform Local Rules for All State Water Court Divisions), and a substantial body of case law.[256] Pursuant to C.R.C.P. 15, courts consider a change application to be a complaint, and a statement of opposition to be a responsive pleading.[257] Stripped to its essentials, an application for a change or new use goes through the following process:

Applicant files an application with the appropriate district water court.[258]

After the water clerk files and numbers the application, the district water judge "promptly reviews" the application to determine whether it contains sufficient information to be published for public notice.[259] If the application is incomplete for publication, the water judge sets a date by which the applicant may submit the required information to avoid application dismissal.

The water clerk publishes the complete application in the court's monthly resume, which serves as public notice of the proposed change.[260] Individuals opposing the change are allotted two months in which they may file statements of objection with the water court.[261]

---

252. Fellhauer v. People, 447 P.2d 986, 993 (Colo. 1968) ("[i]t is implicit in [Colorado's] constitutional provisions that, along with vested rights, there shall be maximum utilization of the water of this state.").

253. *See* Ziemer, *supra* note 11.

254. Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501, 506 (Colo.1982) ("[C]hanges of water rights cannot be effected in any manner other than through judicial approval, following statutorily authorized procedures.").

255. *See* COLO. REV. STAT. § 37-92-305 (2010).

256. Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. § 37-92-101 (2010); COLO. R. CIV. P. 86-91 (general provisions); WATER CT. R. 1-10.

257. *See* COLO. R. CIV. P. 15.

258. COLO. R. CIV. P. 90 (dispositions of water court applications).

259. *Id.*; *see also* COLO. REV. STAT. § 37-92-302(2)(a) (approved standard forms).

260. COLO. R. CIV. P. 90, *supra* note 256.

261. WATER CT. R. 6(e).

Published by U. of Denver, Fall 2010

The water judge refers each case to a water referee, except those that the judge determines to retain for adjudication.[262] A water referee examines the application, statements of opposition, and Division Engineer 's Report, consults with the division engineer, and proposes a decree for the case.[263]

The water court hears protests from the referee 's decision and issues a decree.[264]

An applicant may appeal a water court decree directly to the Colorado Supreme court.[265]

Notwithstanding the apparent virtues of the Colorado system, some of the same challenges that Montana has faced arose in Colorado. In 2007, in response to those challenges, the Chief Justice of the Colorado Supreme Court established a Water Court Committee to "(1) to review the water court process and identify possible ways through statutory and/or rule changes to achieve efficiencies in water court cases while still protecting the quality of outcomes; and (2) to ensure the highest level of competence."[266] Generally, the water court has described deadlines and timelines by rule.[267]

The Water Court Committee included the broad spectrum of stakeholders in its membership, including water users, court personnel, government and private engineering professionals, and attorneys.[268] One compelling feature of this committee effort is that the Supreme Court circulated two surveys—one for members of the public who interact with the Water Court and one for Water Court professionals such as engineers, attorneys, and court personnel—to identify some consensus as to what problems the Committee should address.[269]

The committee recommended a number of amendments to the Water Court Rules which the Court subsequently adopted. [270] Finally, the committee specifically recommended "the creation of an ongoing educational program designed specifically for experts, attorneys, referees, judges, and state water administration officials involved in

---

262. *See* WATER CT. R. 6(a) (Referral to Referee, Case Management, Rulings, and Decrees); *Gardner v. State*, 200 Colo. 221 (1980) (explaining that aside from those water rights requiring adjudication, water judges must refer all applications and statements of opposition to a water referee. The water referee's authority is derivative from, not greater than the water judge's authority. A case will also be heard by a water judge if the water referee's decision is protested and the parties agree to proceed to court.).

263. WATER CT. R. 6(b) ("[t]he referee's ruling and proposed decree shall set forth appropriate findings and conditions as required by COLO. REV. STAT. § 37-92-303 & 305. . . .").

264. *Id.*

265. *See* COLO. REV. STAT. § 37-92-304 (2010).

266. Witwer, *supra* note 209, at 53.

267. *See* WATER CT. R. 6, 11.

268. Witwer, *supra* note 209, at 53.

269. *Id.* (indicating three primary areas of improvement per surveys: (1) timeliness of water court judge's decisions, (2) cost of the process, and (3) need to improve professionalism in water court practice).

270. *Id.* at 54-57.

Published by U. of Denver, Fall 2010

water court proceedings."[271]

B. THE COLORADO APPLICANT'S BURDEN.

Individuals who wish to change a Colorado water right face a considerable evidentiary burden. Water courts require detailed accounts of the applicant's original decree, actual use, and proposed change of the water right. Like Montana and Washington, Colorado's change of water right form requires the applicant to provide a comprehensive description of the existing right's character; including the legal location or GPS coordinates, date decreed, purpose and amount of decreed use, point of diversion.[272] As in Montana, the applicant is also responsible to provide data informing the more complex showings of non-injury and historic consumptive use. An applicant in Colorado must provide a complete statement of change, including topographic maps depicting the existing and proposed places of use, monthly records of actual diversions on which the applicant intends to rely (to the extent the records exist), and in some cases, an analysis of historical return flow patterns.[273]

An applicant for a water right change bears the initial burden to show the change will not injure others' existing water rights.[274] Once the applicant makes a *prima facie* showing of the absence of injury, the burden shifts to the objector to rebut the applicant's case by presenting evidence to the contrary. Upon the objector's submission of evidence, the burden shifts back to the applicant to show a lack of injury by preponderance of the evidence.

Water referees and judges must afford the applicant an opportunity to propose conditions to prevent injury to opposing right holders.[275] If the applicant's proposals do not fully mitigate potential injury, the objectors may propose their own protective terms and conditions for

---

271. *Id.* at 56. The implementation of this program began in the fall of 2009. Sponsored by the Colorado Bar Association, the program includes a water law module, a hydrology and engineering module, and a geographic module that addresses site-specific issues in selected basins. Telephone Interview, Pricilla Fullmer, Program Attorney, Colo. Bar Ass'n (Sept. 16, 2010).

272. Colo. Application for Change of Water Right Form JDF 299W, Question 2.

273. COLO. WATER CT. RULE 3(f). *See also* Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist., 717 P.2d 955, 958-60 (Colo. 1986), *and* Central Colo. Water Conservancy Dist. v. City of Greeley, 147 P.3d 9, 14-15 (Colo. 2006) (citing Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999) ("the right to change a . . . type, place or time of use, is limited . . . by the appropriation's historic use."), *and* Williams v. Midway Ranches Prop. Owners Ass'n, Inc., 938 P.2d 515, 521-22 (Colo. 1997) ("[f]or change purposes, the lawful historic use of an absolute decree is measured over a representative period of time for the appropriation made.").

274. *See* COLO. REV. STAT. § 37-92-305(3) (2010) (a change of water right must be approved if it "will not injuriously affect the owner of or person entitled to use water under a vested water right or decreed conditional water right"); Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799, 810-11 (Colo.2001); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo. 1988); COLO. WATER CT. RULE 6(d).

275. *See* COLO. REV. STAT. § 37-92-305(4)(a)(I)-(IV) (2010).

Published by U. of Denver, Fall 2010

the court's consideration.[276] A decree of change must allow for a reconsideration of the change after implementation to ensure no resulting injury to existing water rights.[277]

C. COLORADO INTERNAL GUIDANCE.

Colorado law requires that its water referees "possess such training and experience as to qualify them to render expert opinions and decisions on the complex matters of water rights and administration."[278] While this description is silent as to what might constitute "training and experience" sufficient to the task, it is nonetheless a legislative acknowledgement that the proper consideration of change applications requires professional training and expertise in the subject matter, at least equal to the professionals who regularly interact with the process through applications or objections.

D. TIMELINES IN COLORADO'S CHANGE OF WATER RIGHT PROCESS.

Colorado's change statute provides some deadlines for referees to rule,[279] but the obligation of the water court is otherwise slight, with terms that evince a general desire for promptness but little specificity of obligation.[280] Since 1969, referees had sixty days after the filing of objections to rule on an application. Referees observed this largely in the breech.[281] Colorado has recently taken action to improve the timeliness of water court actions on change and new use applications. The new Water Court Rules more clearly define the sixty-day requirement for referees and applicants in the expectation that it will reduce the length of their deliberations.[282]

For cases before water referees, the 2009 amendments reaffirm the sixty-day statutory deadline for unopposed applications and require a

---

276. *See id.* at § 37-92-305(3)(a).

277. *See id.* at. § 37-92-304(6) (the water judge designates the period after making comprehensive findings and may extend the reconsideration time upon determining the applicant's non-injury showing is insufficient).

278. *Id.* at § 37-92-203(6).

279. *Id.* at § 37-92-303(1)-(2) (sets a 60-day time limit for referees to rule).

280. *See, e.g., id.* at. § 37-92-304(7) (2010) ("Judgments and decrees shall be entered promptly with respect to matters that have been heard and matters in which no protest has been filed or order of referral entered.").

281. Witwer, *supra* note 209, at 55. *See also* OFFICE OF THE COLORADO STATE COURT ADMINISTRATOR, WATER DATA PRESENTED TO THE SUPREME COURT WATER COMMITTEE, Feb. 11, 2008 (Between 2001 and 2007, Colorado processed an average of 162 applications each year. Table 1: Statewide Water Filings by Case Type. Within these years, applications to change water rights were the third most frequent type of water case filed (45.56 percent of all water cases in Division 3 and 12.05 percent of all water cases statewide). Table 4: Percent of Filings by Case Type and Division. Prior to the 2009 Water Court Rule amendments, the estimated time taken to process a change application before a water referee was a minimum of two years as compared to an average of one year process time for all applications. Table 5: Colorado Water Courts, time to Disposition FY 2007. In the 2007 fiscal year, the time taken for a change proceeding to reach disposition was 2.21 years. Table 5: Colorado Water Courts, time to Disposition FY 2007.); *see also* Personal Communication to Amy Beatie, Colorado Water Trust (July 2010).

282. Witwer, *supra* note 209, at 55.

Published by U. of Denver, Fall 2010

decision "as quickly as possible" or within one year in opposed cases.[283] As of February 2009, Colorado's water referees and judges are required to process change applications within specific time constraints now mandated by the Water Court Rules. The amendments also set deadlines for the water referee to obtain the Division Engineer's reports, schedule conferences when adverse parties file statements of opposition, and file comments, decrees and status reports related to the Case Management Plan. Cases the water court hears take significantly longer than cases a water referee hears.[284] The trial length itself and the time to post-trial disposition can vary greatly, depending on the nature of dispute and proposed change.

VII. RECOMMENDATIONS FOR MONTANA'S CHANGE PROCESS.

The comparison between Montana, Washington, and Colorado's change processes reveals that all three states wrestle with some of the same challenges, including how to: be timely in processing applications while maintaining a careful, in-depth review; make the change process evolve along with the evolution of the state's water law; and maintain a consistent, professional level of review across agency or water court staff. While there are no "silver bullet" solutions to any of these challenges, each state has made exemplary progress in some area, from which the other two states could learn.

Montana's DNRC, for example, appears to have the smallest backlog of applications, and the most transparent time-frames to complete specific stages of review. Washington's DOE appears to have the most systematic, thorough approach to training new staff, and developing the expertise of current staff. Colorado's water court system appears to have developed the most consistent level of review across staff and jurisdictions. There are lessons to be learned from each of these state-specific accomplishments. Below, the authors present their best effort to synthesize these state-specific accomplishments, and apply them to the Montana change process.

A. RECOMMENDATION ONE: A WATER RESOURCES ADVISORY COMMITTEE.

DNRC's Strategic Plan already identified the authors' primary recommendation: create and maintain a Water Resources Advisory Committee as described in the 2005-2010 DNRC Strategic Plan.[285] Given the quick pace of evolution in Montana's water law at the turn

283. COLO. WATER CT. R. 6(e); COLO. REV. STAT. § 37-92-303(1) (2010).

284. COLO. WATER CT. R. 11(b)(1) (at issue date set 45 days after the earlier of either entry of an order of referral or filing of a protest to the ruling of the referee, unless the court directs otherwise.); COLO. WATER CT. R. 11(b)(4) (Applicant must set the trial date 60 days after the case is at issue.), *available at* http://www.courts.state.co.us/userfiles/File/Full_set_of_CRCP_and_Water_Rules.doc.

285. *See* DNRC Water Resource Division Strategic Plan 2005-2010, *supra* note 111, at 5.

Published by U. of Denver, Fall 2010

of the twenty-first century, it makes sense to engage Montana's water resource professionals in an advisory role to the agency. The Advisory Committee can help provide constructive feedback to the agency about what is—and is not—working from an applicant's and objector's perspective as DNRC grapples with implementation of its new statutory directives.[286] In addition, the Advisory Committee can help bridge the gap in institutional memory and continuity that stems from inevitable staff turn-over within DNRC.

Colorado's experience with such a multi-stakeholder, professional Advisory Committee appears to have been positive.[287] The circulation of surveys to professionals and applicants that had regularly engaged with the Colorado Water Court system helped identify the highest-priority issues,[288] and the Advisory Committee's recommendations were ultimately adopted by rule amendment.[289] Learning from Colorado's experience, a Montana Advisory Committee should likewise include the regulated public and professionals interacting with the Agency on a regular basis. The circulation of surveys may also provide a very constructive way to channel the collective experience of water resource professionals who engage with the agency in Montana, and make that resource available to DNRC.

The authors see several issues that such an Advisory Committee could tackle. One such issue could be to work with the DNRC to provide an inventory of accepted methodologies for establishing pre-1973 historic use and return flows. Such an inventory of methodologies should likewise address the amount of information that meets the change application standard of correct and complete, and then describe what meets the burden of proof required to obtain a grant of a change application, in the context of each particular methodology.[290] While, of course, such an inventory of methodologies could not provide a "cookie cutter" or "one size fits all" approach to the highly fact-specific realm of water rights transfers, it would provide a very useful touchstone of consensus expertise on particular, troublesome issues.

B. RECOMMENDATION TWO: GREATER PROFESSIONAL TRAINING FOR DNRC STAFF.

The authors offer a second recommendation, related to the first. Just as an inventory of accepted methodologies for particular criteria in the change process would be helpful to potential applicants, training for DNRC staff in methodologies that applicants can rely on to meet the change application criteria would be very helpful. It would help improve the professional expertise of the DNRC staff so that they would

---

286. *See* discussion *supra* Parts II A., IV E (describing passages of HB 831 and HB 40).

287. *See* Witwer, *supra* note 209, at 53.

288. *Id.* at 53-54.

289. *Id.* at 53.

290. *See, e.g.,* WATER RIGHT CHANGES: INFORMATION AND INSTRUCTIONS, *supra* note 71 (analyzing the "substantial credible information" standard as defined as "probable, believable facts" for correct and complete application information).

Published by U. of Denver, Fall 2010

know how to apply the methods in different factual contexts. In addition, training in the basic legal concepts behind the change application process would help DNRC staff in their review of what constitutes an adequate showing of proof for different change application criteria.

Here, Montana can learn from Washington's Department of Ecology (DOE). DOE compiled an extensive collection of guidance documents to guide and ensure consistency among water resources program staff.[291] DOE produced the Water Resources Program Policies and Procedures using agency staff management teams and by incorporating public comment, and has made this guidance document easily available to the public. Particularly noteworthy to Montana's implementation of HB 40 that requires DNRC to make a preliminary decision on applications, DOE has invested extra effort in creating transparent, consistent, and publicly-accessible, preliminary decisions on applications.[292] Washington's investment in training staff and sharing information with the regulated public promotes more accurate record-building, earlier dispute-resolution, and more transparent agency action.

C. RECOMMENDATION THREE: PUBLIC RULEMAKING IN ACCORDANCE WITH THE MONTANA APA.

Consistent with this article's theme of consistency and transparency in agency decision-making, the authors recommend that DNRC conduct rule-making in accordance with Montana's APA standards—ensuring transparent and public procedures—for adopting any new methodologies that the DNRC can use to document compliance with the statutory criteria. The rationale for this recommendation is that any procedure that purports to increase or decrease the burden on the applicant to meet the statutory criteria should go through rule-making.

Here, Montana can look to its own experience last year with the adoption through public rule-making of county management factors to guide estimates of partial-service irrigation.[293] The agency's process provided extensive outreach to the regulated community through a series of public sessions, incorporated public comment, and the DNRC made the final product accessible through postings on the agency's website.[294] While not everyone has happily embraced the final product, this example of DNRC adopting a methodology for calculating partial-service irrigation through public rule-making led to a transparent,

---

291. *See* Barwin, *supra* note 209 (describing the Washington Dept. of Ecology's *Water Resource Program Policies and Procedures*).

292. *See* Interview with Robert Barwin, *supra* note 209; *see* POL 1005, *supra* note 248.

293. *See* 22 Mont. Admin. Reg. Notice 36-22-134 (Nov. 25, 2009), *available at* http://www.mtrules.org/gateway/showNoticefile.asp?TID=2238 (showing proposed amendments to ARM 36.12.1901 and ARM 36.12.1902).

294. *See generally* DNRC & WATER MGMT. BUREAU, DNRC CONSUMPTIVE USE METHODOLOGY (Mar. 17, 2010), http://www.dnrc.mt.gov/wrd/water_rts/appro_info/cu_methodology.pdf (last visited Sept. 21, 2010).

Published by U. of Denver, Fall 2010

public, decision-making process that was easily accessible to applicants. It is a model that the DNRC could follow with regard to other statutory criteria that would improve the DNRC's consistency and professional standards in its review and decision-making on applications. Of course, as with any new methodology, the DNRC will have to remain attentive to refinements that are required in the methodology's application in order to have a workable process.[295]

D. Recommendation Four: Develop a Technical Educational Program Directed at Attorneys, Consultants, and DNRC's Professional Staff.

The development of an educational program to increase the professional and technical expertise of both DNRC's staff and those who interact with the agency regularly—such as hydrologists, consultants, and attorneys—would accomplish two worthy goals. First, it would allow water resources professionals to learn together, and, by learning together, the water resource professionals keep current with the evolution and refinement of applicable methodologies and analytical tools. Again Colorado's example is instructive. Working with the State Bar Association, the state developed a series of course that specifically address the skills needed to operate in the state Water Court.[296]

Second, it would provide a forum for a critical review of new methodologies or refinements of analytical tools. This would allow a "test drive" of methodologies that the DNRC may be considering adopting as a standard among water resource professionals.

E. Recommendation Five: Develop a DNRC Web-Library of Specific Accepted Methodologies, References, and Documentation.

Transparent agency decision-making and well-informed, well-documented applications begin with a common understanding of requirements and available resources. An electronic library of specific methodologies, references, and acceptable documentation made available on DNRC's website would be an important first step toward developing this common understanding. There are features already in the DNRC's website that partially accomplish this. Under the "Water Rights" tab at the website, clicking on the reference "new appropriations" takes one to a list of references that can be quite helpful in navigating parts of the application process.[297] It is incomplete, however. Particularly during a time of evolving standards

295. Interview with Matthew Williams, *supra* note 128. One refinement that would improve the methodology is changing the requirement that the historic, consumptive-use flow-rate for flood irrigation be evenly divided across a sixteen-week irrigation season. This results in a large, downward adjustment in a senior, historic irrigation right's flow rate that is in priority in the water-scarce months of July and August, just when, historically, the crop consumption was greatest.

296. *See* Telephone Interview with Priscilla Fulmer, *supra* note 271.

297. DNRC Water Resources Division, *available at* http://www.dnrc.mt.gov/wrd/.

Published by U. of Denver, Fall 2010

and application requirements, such an electronic "collective consciousness" would be a way to maintain communication between the agency and applicants.

F. RECOMMENDATION SIX: INITIATE RULE-MAKING TO CLOSE THE DEADLINE LOOPHOLE BETWEEN "DEFICIENCY LETTER RESPONSE" AND "CORRECT AND COMPLETE."

After the 2009 legislature, Montana now has a specific, statutorily-defined review process that purports to limit the time of review,[298] both prior to public notice and after the completion of a contested case hearing.[299] The process of allowing an applicant to correct an application that is deficient can take up to 270 days[300] and from the time the agency has received a correct and complete application, it has 120 days to make a preliminary decision on the application.[301]

One problem is that there is a gap in the timelines. While the new provisions increase agency accountability, there is still substantial uncertainty arising out of the lack of deadline for the agency' s finding of correct and complete, after receiving a timely response from an applicant to the agency' s deficiency letter. Another uncertainty is whether the agency can deny a correct and complete determination on grounds that the agency not identify in the initial deficiency letter; or, whether the agency can send a second, follow-up deficiency letter if the applicant ' s first response was not satisfactory.

Resolving these issues in implementing the new statutory directives could be another useful role for a Montana Advisory Committee. While Colorado has experienced the same challenges as Montana and Washington with the issuance of timely decisions on applications, it has actively engaged all of the participants in its processes to craft a solution. The Colorado Supreme Court has taken measures to enhance the accountability of both applicants and referee by recent rule amendments, stemming from the Colorado Advisory Committee recommendations.

VIII. CONCLUSION

The ability to transfer water from one use to another is essential to twenty-first century water management. With increasing water demands in a climate of increasing water scarcity, transfers are the linchpin of the future—transfers of water between uses will be what prevents the proverbial wheel from sliding off the axle. This puts a newfound pressure on our water agencies to have a workable change-in-use process for transferring water rights; one that protects the value of senior water rights while at the same time allowing applicants to get through the process in a timely, predictable way.

---

298. MONT. CODE ANN. §§ 85-2-302(5) & 85-2-307(2) (2009).
299. *Id.* at. § 85-2-310.
300. *Id.* at. § 85-2-302(5)&(6).
301. *Id.* at. § 85-2-307(2)(a).

Published by U. of Denver, Fall 2010

The experiences of Washington and Colorado provide relevant insights for Montana's water agency, and the six chief recommendations in this article are intended to help provide a roadmap for success based on a synthesis of this tri-state experience. The over-arching theme of the recommendations is to achieve consistent, transparent agency decision-making, based on shared knowledge and clear communication of required elements of proof. The path to that point is making use of the knowledge, experience, and expertise of both DNRC's professional staff and the community of professionals that regularly engage with the agency, while providing avenues for continually improving the collective experience and expertise. Ultimately, the six recommendations acknowledge that we're all in this together, and that we'd better all pull in the same direction to make the process work.